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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 299

T. E. STEPHENS,

vs. *Petitioner,*

RICHMAN & SAMUELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 299

T. E. STEPHENS,

Petitioner,

vs.

RICHMAN & SAMUELS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Hon. Harlan F. Stone, Chief Justice, and the Associate Justices, of the Supreme Court of the United States of America:

Your petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is an action at law brought in the 93rd Judicial District Court of Hidalgo County, Texas, by the petitioner herein against respondent, and in due and proper time was properly removed from that court to the United States District Court for the Southern District of Texas, Brownsville

Division. (See Transcript of Record, p. 39, Order of Removal.) The case was not tried in the latter court on its merits, but upon motion filed by respondent to quash the process and dismiss the case, an order was entered by the United States District Court for the Southern District of Texas, quashing the process and dismissing the case. (See Transcript of Record, Order Quashing Service and Dismissing the Cause, Memorandum Opinion of the Lower Court, p. 278, and Final Decree, p. 290.)

An appeal was taken from said judgment of dismissal and quashing of service by your petitioner to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court, on the 1st day of April, 1941, affirmed the judgment of the lower court (see Transcript of Record, Memorandum Opinion, p. 402, and Judgment, p. 404); and on the 10th day of May, 1941, overruled your petitioner's motion for rehearing. (See Transcript of Record, Order Denying Rehearing, p. 412.)

For cause of action against the respondent, your petitioner alleged in substance in his pleading that he was a citizen of Texas, residing in Hidalgo County, Texas, at all times during which the matters in controversy arose; that respondent was first doing business under the name of the partnership of Richman & Samuels, and that your petitioner was their general agent in Texas, handling the partnership's business of buying and selling vegetables of all kinds in Hidalgo, Cameron and Starr Counties, under an agreement that petitioner would be allowed a drawing account varying from year to year, and a certain percentage of the net profits on the business done by the partnership, this percentage also varying from year to year; that respondent was incorporated in 1925, and took over the business of the partnership and assumed the obligations of the partnership; that the partnership "clipped" or made false returns to petitioner as to the net profits of the business

done by the partnership; that respondent did the same thing until about the year 1927, when your petitioner went into the vegetable business for himself, and then respondent's agent solicited your petitioner to consign to respondent vegetables in carload lots, which respondent did in an amount of many hundreds of carloads; that respondent again "clipped" and made false returns. Petitioner never discovered the fraud as to this clipping until shortly before the filing of this suit. The amount sought to be recovered by petitioner for his share of the said profits when he was working for respondent and said partnership, and the amount fraudulently retained from the vegetables consigned by petitioner to respondent by the "clipping" aforesaid, exceeds Three Thousand Dollars by a large sum. (See Transcript of Record, Plaintiff's First Amended Original Petition, pp. 66-100, inc.) The respondent is a corporation organized under the laws of the State of New York, with its principal place of business in the City of New York. When respondent obtained a permit to do business in Texas in 1934, it appointed Travis B. Moursund as its State agent for service, as required by Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, as a condition precedent to its right to obtain a permit. (See Transcript of Record, p. 120, Power of Attorney designating Travis B. Moursund as agent for service for Richman & Samuels, Inc.) (See, also, Transcript of Record, p. 127, Stipulation, Respondent ceasing to do business in Texas prior to January 19, 1938; as to revoking Moursund's power of attorney January 25, 1938.) Shortly before your petitioner filed his suit, respondent surrendered its permit to do business in Texas, and revoked the power of attorney of Travis B. Moursund as its agent for service. (See Transcript of Record, p. 124, Application to Surrender Permit, dated January 15, 1938; and p. 123, Surrender of Permit.) Petitioner had no knowledge of this revocation

at the time he filed his suit and process was issued and served on Travis B. Moursund, nor was said revocation filed with the Secretary of State of Texas, nor any agent for service appointed by respondent as the successor to Travis B. Moursund. (See Transcript of Record, p. 127, Stipulation; also pp. 110-111, Deposition of Edward Clark.)

There are really two issues presented to this Court:

(1) Did respondent, in appointing or designating Travis B. Moursund as its State agent for service as required under Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, waive its privilege to be sued in the district of its domicile, and consent or agree that process served on said agent in this case was valid; and, if so, was the order of the court quashing the same error?

(2) Regardless of the validity of said process, was it error for the trial court to dismiss your petitioner's case?

II.

Statement Disclosing the Jurisdiction of This Court.

This Court has jurisdiction under Section 240a of the Judicial Code, and its amendments, in view of the fact that the judgment of the Fifth Circuit Court of Appeals affirming the judgment of the trial court, was entered on the 1st day of April, 1941, and your petitioner's motion for rehearing was overruled on the 10th day of May, 1941, and this petition has been filed within less than three months after the judgment of the Circuit Court of Appeals for the Fifth Circuit was entered, overruling your petitioner's motion for rehearing in that court; also under Section 262 of the Judicial Code (28 U. S. C. A. 377); and also under the holding of this Court in the case of *In re 620 Church Street Building Corporation, et al.*, 57 S. Ct. 88, 299 U. S. 24, 81 L. Ed. 16, in which it is in effect held that the jurisdiction of this Court affords ample authority for issuing the writ

requested as an auxiliary process and as a means of "giving full force and effect to existing appellate authority and of furthering justice in kindred ways."

III.

Questions Presented.

In quashing the service of process issued out of the 93rd Judicial District Court of Hidalgo County, and served upon Travis B. Moursund who had theretofore been duly appointed by respondent as its State agent for service as required by Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, and dismissing petitioner's petition after the case had been removed by respondent to the Federal Court, the legal questions presented to this Court as a result of said action of the lower courts, are:

(1) Did the appointment by respondent of Travis B. Moursund as its State agent for service of process, in pursuance of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, constitute a consent of respondent to be sued in the Texas courts, both State and Federal, by your petitioner on the cause of action alleged in his petition, and a waiver by respondent of its privilege to be sued in the district of its domicile?

(2) Your petitioner being a citizen of Texas and having brought his suit in the 93rd Judicial District Court of Hidalgo County, and the amount involved, exclusive of interest and costs, being far in excess of Three Thousand Dollars, and respondent being a foreign corporation,—did the order of the trial court and the affirmance of its action by the Circuit Court of Appeals for the Fifth Circuit, in quashing the service of process in this case had upon Travis B. Moursund as the State agent for service of respondent, involve a question of jurisdiction of the trial court, or did it involve a question of venue; and, if venue, did respondent waive the same when it executed and filed for record

its power of attorney appointing Travis B. Moursund as its State agent for service as provided in Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision?

(3) In view of the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, and the provisions in the power of attorney executed by respondent appointing Travis B. Moursund as its State agent for service of process,—does the validity of the process thus quashed by the order of the trial court, and affirmed by the Fifth Circuit Court of Appeals, depend upon the question as to whether or not your petitioner's cause of action against respondent shall have arisen in Texas, or is it sufficient to sustain the validity of said process and jurisdiction of the court, that your petitioner's cause of action shall have arisen out of business conducted by the respondent in Texas with petitioner while your petitioner was a citizen of Texas?

(4) In view of the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, that provide conditions precedent of respondent, a foreign corporation, to obtaining a permit to do business in Texas, for the appointment of a State agent for service of process in all actions pending and those that might afterwards be filed against respondent,—was respondent's attempted revocation of its appointment of Travis B. Moursund as its State agent for service of process effective to the extent that it invalidates the service of process in this case had upon Travis B. Moursund?

(5) The undisputed evidence showing that petitioner's contracts with respondent and its predecessor partnership were made in Texas, and your petitioner performed all of his services in Texas, and respondent solicited your petitioner's business in Texas,—did your petitioner's cause of action sued on as a matter of law arise in Texas?

(6) Are the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, providing

> "A power of attorney designating some individual who is a resident citizen of this State as its service agent on whom process may be served in all suits, proceedings, and causes of action pending or hereafter filed in this State in which said corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas,"

such language as in decency and common honesty compels this Court to construe the statute to include causes of action arising out of the State of Texas for which the appointment was given or made?

(7) Do the provisions in the power of attorney executed by respondent appointing Travis B. Moursund as its State agent for service

> "does hereby make, constitute and appoint Travis B. Moursund * * * its true and lawful attorney in fact for and in the State of Texas, upon whom all process of law against said corporation and any action or legal proceeding may be served, subject to and in accordance with the provisions of the laws of the State of Texas and all amendments thereto, and the said corporation hereby specially agrees that any and all lawful process against it which may be served upon its said attorney in fact shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said corporation, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas and for a period of four years from and after the date said corporation shall have surrendered its charter,"

constitute such language as compels this Court in honesty and common decency to the conclusion that respondent voluntarily waived its privilege to be sued in the district of its domicile, and voluntarily consented that it might be sued in Texas by your petitioner on the cause of action asserted by petitioner to have grown out of business transactions had between your petitioner and respondent in Texas, and an agreement on the part of respondent that process thus served on its State agent, Travis B. Moursund, would be valid in this case?

IV.

Reasons Relied Upon by Your Petitioner for Granting of the Requested Writ of Certiorari.

(1) As heretofore pointed out in this petition, this Court has jurisdiction.

(2) The decision of the Circuit Court of Appeals for the Fifth Circuit involves the proper interpretation and construction of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision.

(3) The holding of the Circuit Court of Appeals for the Fifth Circuit, that the provisions of Article 2031a aforesaid of the Revised Civil Statutes of Texas, 1925 Revision, apply only to causes of action arising within the State of Texas, does violence to the spirit and purpose of the statute, because it clearly applies to causes of action arising out of business conducted by the corporation or had in relation to corporate acts done in Texas, and therefore applies to your petitioner's cause of action because the uncontradicted evidence shows that your petitioner's contracts with respondent were made in Texas, your petitioner performed all his services in Texas, and respondent's agent solicited your petitioner's business in Texas; and is contrary to holdings of this Court in the case of *Louisville & N. R. Co.*

v. *Chatters* and *Southern Ry. Co. et al.* v. *Chatters*, 49 Sup. Ct. Rep. 329.

(4) The holding by the Fifth Circuit Court of Appeals in this case that Petitioner's cause of action as alleged in his petition and as shown by the evidence arose beyond the boundaries of the State of Texas, is clearly erroneous, because the undisputed evidence showed that your Petitioner's contracts were made in Texas and he performed all of his services in Texas; and said holding is clearly in conflict with the following decisions of the Texas courts: *Hoffer Oil Corporation* v. *Brian*, 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian*, 64 S. W. (2d) 363.

(5) The holding by the Fifth Circuit Court of Appeals in this case that Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, applies during the four years after the corporation ceased to do business in Texas, only to causes of action arising within the State of Texas, is clearly erroneous, because the following language in said statute compels this Court to hold said statute to include causes of action arising outside of the State of Texas, to-wit:

> "A power of attorney designating some individual who is a resident citizen of this State as its service agent on whom process may be served in all suits, proceedings, and causes of action pending or hereafter filed in this State in which said corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas."

(6) The holding of the Fifth Circuit Court of Appeals that Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, applies during the four years after a corporation ceases to do business in Texas, only to causes of

action arising within the State of Texas is clearly erroneous, because the following language contained in the power of attorney appointing Travis B. Moursund by the Respondent as its State agent for service, compels this Court to hold that Respondent voluntarily waived its privilege to be sued in the district of its domicile, and consented voluntarily that it might be sued in Texas by Petitioner on the cause of action alleged by petitioner in his petition, and that the process served on its agent, Travis B. Moursund, would be valid:

> "does hereby make, constitute, and appoint Travis B. Moursund * * * its true and lawful attorney in fact for and in the State of Texas, upon whom all process of law against said corporation and any action or legal proceeding may be served, subject to and in accordance with all the provisions of the laws of the State of Texas and all amendments thereto, and the said corporation hereby specially agrees that any and all lawful process against it which may be served upon its said attorney in fact shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said corporation, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas and for a period of four years from and after the date said corporation shall have surrendered its charter."

(7) The holding of the Fifth Circuit Court of Appeals, in affirming the judgment of the trial court in quashing service of process in this case and dismissing your Petitioner's case, is in direct conflict with the holding of this Honorable Court in the case of *Neibro Company* v. *Bethlehem Shipbuilding Corporation*, 60 Sup. Ct. Rep. 153, in that the *Neibo* case holds that the Federal courts have jurisdiction in all cases where the necessary diversity of citizenship exists and the required amount in controversy is involved, and that it is a question of privilege of the defendant as to

the venue of the court, and this he may waive, and in fact does waive, where he appoints an agent for service of process and consents that that process shall be valid. And, therefore, it is immaterial where a cause of action may have arisen. But in this case the holding of the Fifth Circuit Court of Appeals is to the contrary, because it holds that such an appointment and such waiver and such consent are limited to causes of action arising within the jurisdiction of the State of the residence of the agent appointed.

(8) Even if it be admitted that the process served on Travis B. Moursund in this case should have been quashed, the trial court should not have dismissed your petitioner's case, nor should the Circuit Court of Appeals for the Fifth Circuit have affirmed the order of the trial court dismissing your Petitioner's case, because under the provisions of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, your Petitioner should have been given an opportunity to have cited Respondent by serving process on the Secretary of State of Texas, because under the provisions of said statute, the Secretary of State becomes Respondent's agent for service when Respondent surrenders its permit and ceases to do business in Texas and revokes its power of attorney for service of process on Travis B. Moursund and does not appoint or designate "immediately" another agent for said purpose.

(9) The Fifth Circuit Court of Appeals has decided an important question of local law in the interpretation and construction of Article 2031a of the Revised Civil Statutes of Texas, 1925 Revision, in holding that the same only applies to causes of action arising in Texas, contrary to, and probably in conflict with what will be the local decisions on that question of the courts of Texas, when the statute comes before said courts for interpretation and construction.

(10) The holding of the Fifth Circuit Court of Appeals that your Petitioner's cause of action did not arise in Texas, in view of the fact that the undisputed evidence showed that all of your Petitioner's services were rendered to Respondent in Texas, is absolutely in conflict with the decision of the Texas courts in the following cases: *Hoffer Oil Corporation* v. *Brian,* 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian,* 64 S. W. (2d) 363.

(11) Your Petitioner's causes of action alleged in his pleadings are not barred under the applicable statute of two years' limitation of Texas, because the statute is suspended as against your Petitioner's causes of action until your Petitioner obtained knowledge of the facts constituting said fraud, or knowledge of such facts as put him upon inquiry which, if diligently pursued, would have disclosed said facts, and this knowledge he has alleged not to have acquired until just a few months before filing his suit in the 93rd Judicial District Court of Hidalgo County, Texas.

(12) In the event your Petitioner's suit is dismissed, your Petitioner could not institute and successfully prosecute his suit in the courts of New York, because his causes of action would be barred under the applicable statutes of limitation of that State.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of said Fifth Circuit Court had in said case numbered 9391 and entitled on its docket *T. E. Stephens, Appellant,* v. *Richman & Samuels, Inc., Appellee,* to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States and the decisions of this Hon-

orable Court, and that the judgment herein of said Fifth Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as to this Court may seem proper in the premises.

Dated July 22, 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 299

T. E. STEPHENS,

Petitioner,

vs.

RICHMAN & SAMUELS, INC.,

Respondent.

BRIEF OF PETITIONER.

I.

Official Report of Opinions Below.

The opinion of the District Court of the Southern District of Texas, Brownsville Division, in this case has not been reported but will be found on pages 278-291 of the printed record. The opinion on appeal in the Circuit Court of Appeals for the Fifth Circuit is reported in 118 F. (2d) 1011, and appears on pages 402-404 of the Transcript of the Record, Certified by the Clerk of the Circuit Court below.

II.

Concise Statement of the Grounds of Jurisdiction.

1. The date of the judgment to be reviewed is April 1, 1941, on which rehearing was denied May 10, 1941 and

the judgment of the Circuit Court of Appeals for the Fifth Circuit became final on May 10, 1941.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240 (a) of the Judicial Code as amended by the Act of February 12, 1925, C. 229, 43 Stat. 938 (28 U. S. C. A. Sec. 347) and Section 262 of the Judicial Code (28 U. S. C. A. Sec. 377).

3. Sections II (p. 4) and Section IV (p. 8-13) of the foregoing petition are here adopted as further grounds of jurisdiction of this Court.

4. The cases believed to sustain said jurisdiction are as follows:

In Re 620 Church Street Building Corporation, et al., 57 Sup. Ct. 88, 299 U. S. 24, 81 L. Ed. 16;

United States v. *Beatty,* 232 U. S. 463, 467, 34 Sup. Ct. 392, 394, 58 L. Ed. 686;

Neibro Company v. *Bethlehem Shipbuilding Corporation,* 60 Sup. Ct. 153, 308 U. S. 165, 84 L. Ed. 123.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-4) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that petitioner's cause of action herein sued on "arose beyond the boundaries of the State of Texas", because the undisputed evidence showed that petitioner's contracts with respondent were made in Texas, and he performed all of his services in Texas, and re-

spondent's agents solicited petitioner's business in Texas; therefore, petitioner's cause of action, as a matter of law, arose in Texas.

2. The Circuit Court of Appeals for the Fifth Circuit erred in holding that Article 2031a, Revised Civil Statutes of Texas (Vernon's edition) applies during the four years after the corporation ceased to do business in Texas "only to causes of action arising within the State of Texas", because said statute also applies to causes of action having arisen out of business conducted by the corporation or had in relation to corporate acts done in Texas, and it applies to petitioner's cause of action because the uncontradicted evidence shows that petitioner's contracts with respondent were made in Texas, and petitioner performed all of his services in Texas, and respondent's agents solicited petitioner's business in Texas.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that Article 2031a, Revised Civil Statutes of Texas (Vernon's edition) applies during the four years after the corporation ceased to do busines in Texas "only to causes of action arising within the State of Texas", because the provisions in said statute:

> "A power of attorney designating some individual who is a resident citizen of this State as its service agent on whom process may be served in all suits, proceedings, and causes of action pending or hereafter filed in this State in which said corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas."

is such language as compels the Court to construe the statute to include causes of action arising outside of the

State of Texas for which the appointment was given or made.

4. The Circuit Court of Appeals for the Fifth Circuit erred in holding that Article 2031a, Revised Civil Statutes of Texas (Vernon's edition) applies during the four years after the corporation ceased to do business in Texas "only to causes of action arising within the State of Texas", because the provisions in the power of attorney executed by respondent to Travis B. Moursund appointing him as a State agent for service of process,

> "does hereby make, constitute, and appoint Travis B. Moursund * * * its true and lawful attorney in fact for and in the State of Texas, upon whom all process of law against said corporation and any action or legal proceeding may be served, subject to and in accordance with all the provisions of the laws of the State of Texas and all amendments thereto, and the said corporation hereby specially agrees that any and all lawful process against it which may be served upon its said attorney in fact shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said corporation, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas and for a period of four years from and after the date said corporation shall have surrendered its charter,"

is such language in said power of attorney as compels the court to the conclusion that said corporation voluntarily waived its privilege to be sued in the district of its domicile, and consented voluntarily that it might be sued in Texas by petitioner on the cause of action asserted by petitioner and the process when issued and served on said agent would be valid.

(5) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the trial court and quash-

ing service of process and dismissing petitioner's case, because by appointing Travis B. Moursund as its state agent for service of process in all cases then pending and there afterwards filed, respondent voluntarily waived its privilege to be sued in the district of its residence, and voluntarily consented that all process in all cases would be valid.

(6) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the trial court quashing process and dismissing petitioner's cause, by following a line of cases construing entirely different statutes from that of Texas, as well as powers of attorney with entirely different provisions in them from the one in the instant case.

(7) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the trial court and dismissing petitioner's case, by overlooking the proposition that the trial court as such, by reason of diversity of citizenship and the amount in controversy, had jurisdiction under the holding of the case of *Neibro Co.* v. *Bethlehem Shipbuilding Corporation*, 60 S. Ct. Rep. 153.

(8) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the trial court dismissing petitioner's case and by holding in effect that respondent's privilege to be sued in the District of its residence is not a personal privilege and cannot be and has not been waived by the appointment of Travis B. Moursund as its agent for service as to causes of action arising out of Texas.

(9) The Circuit Court of Appeals for the Fifth Circuit erred in holding in effect that respondent is not bound by its consent to be sued in Texas under the terms of the power of attorney given Travis B. Moursund as its agent for service in Texas, and under the provisions of Article 2031a, Re-

vised Civil Statutes of Texas, even though compliance with said statute by respondent, and the execution of said power of attorney were voluntary acts of respondent.

V.

ARGUMENT.

Summary of Argument.

POINT ONE.

Where there is diversity of citizenship and the amount involved exceeds the sum of $3,000.00, as in this case, the Federal District Court had potential jurisdiction.

Petitioner's Statement Under Point of Law No. One.

It is undisputed in the record that the petitioner at all times, involved herein, was and still is a citizen of Hidalgo County, Texas, in the Southern District of Texas and in the Brownsville Division thereof.

It is undisputed in the record that the respondent is a New York corporation, both from the pleadings of the petitioner in his original petition (R. 16-17) and his first amended original petition (R. 66), and also from the admission in respondent's original motion to dismiss, reading:

> "Defendant admits that it is a private corporation organized and existing under the laws of the State of New York; that it was organized about August, 1925."

As heretofore pointed out in the foregoing petition, the amount of money involved is far in excess of $3,000.00.

In *Neibro Company* v. *Bethelehem Building Corporation, Ltd.*, U. S. Sup. Ct., 84 L. Ed. 123, 60 S. Ct. 153, 308 U. S. 165, this Honorable Court held that where there was diversity of citizenship and the amount involved exceeds the sum of $3,000.00 that the Federal Court had potential juris-

diction. Therefore, the United States District Court, Southern District of Texas, Brownsville Division, had jurisdiction in this case, and the Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment of the trial court dismissing petitioner's case.

POINT TWO.

Under Article 2031a, Revised Civil Statutes of Texas, 1925, and under the provisions of the power of attorney executed by respondent designating Travis B. Moursund, its Texas agent for service of process, respondent voluntarily consented that the Texas courts, both State and Federal, might exercise jurisdiction over the cause of action sued upon by petitioner, and respondent waived any right or privilege to be sued elsewhere, and consented that service of process in this case on respondent might be had by serving the same on Travis B. Moursund, its agent for said purpose.

Petitioner's Statement Under Point of Law No. Two.

Petitioner has set out Article 2031a, Revised Civil Statutes of Texas, 1925 Revision, in the appendix to this brief, to which reference is here made.

The pertinent provisions of Article 2031a of the Revised Statutes of Texas, 1925 Revision, that provide as conditions precedent what a foreign corporation shall do before obtaining a permit to do business in Texas are:

> "Each" (meaning foreign corporations) "shall file in the office of the Secretary of State a power of attorney designating some individual who is a resident of this State, as its service agent on whom process may be served IN ALL SUITS, PROCEEDINGS AND CAUSES OF ACTION PENDING OR HEREAFTER FILED IN THIS STATE, IN WHICH SAID CORPORATION IS A PARTY OR IS TO BE MADE A PARTY, and SAID POWER OF ATTORNEY SHALL BE IN EFFECT so long as said corporation is author-

> ized to do business in Texas, AND FOR A PERIOD OF FOUR YEARS FROM AND AFTER THE DATE ANY SUCH FOREIGN CORPORATION SHALL HAVE SURRENDERED ITS CHARTER OR CEASED TO DO BUSINESS IN TEXAS. * * * The power of attorney required by the Act shall, in addition to stating the name and address of the agent, also stipulate that said agent is appointed as the corporation's service agent in Texas, and SAID FOREIGN CORPORATION CONSENTS TO THE SERVICE OF PROCESS UPON SAID AGENT, and that he shall be deemed as the service agent of said corporation for all intents and purposes as contemplated by the statutes, * * * and filed with the Secretary of State; and further providing, in the event of revocation * * *, said foreign corporation shall immediately substitute the name of some other individual by a similar power of attorney * * *, so that at all times an agent shall be available upon whom service of process may be had." (Caps ours.)

Pursuant to the provisions of said statute, respondent voluntarily complied with the same by executing a power of attorney appointing Travis B. Moursund its agent for service. The full contents of said power of attorney are found in the transcript at pp. 120-123, which power of attorney provided, among other things, as follows:

> "Know All Men by These Presents, that Richman & Samuels, Inc., a corporation duly chartered as such under the laws of the State of New York, does hereby make, constitute and appoint Travis B. Moursund, Gunter Building, San Antonio, Texas, a resident citizen of Texas, its true and lawful attorney in fact for it in the State of Texas, upon whom ALL PROCESS OF LAW against said corporation IN ANY ACTION OR LEGAL PROCEEDING may be served subject to and in accordance with all the provisions of the laws of the State of Texas and all amendments thereto. And the said corporation hereby specially agreed that any and

all lawful process against it which may be served upon its said attorney in fact, SHALL BE DEEMED VALID PERSONAL SERVICE UPON SAID COMPANY,—AND SHALL BE OF THE SAME FORCE AND VALIDITY AS IF SERVED UPON SAID CORPORATION, and this authority shall continue in full force as long as said corporation is authorized to do business in Texas, AND FOR A PERIOD OF FOUR YEARS from and after the date said corporation shall have surrendered its charter or shall have ceased to do business in Texas, duly passed on the 30th day of July, 1934," etc., signed Mayer Samuels, Vice-President, with corporate seal affixed, and properly acknowledged—(Caps ours) (R. 120-123).

Respondent surrendered its permit to do business in Texas on or about January 19, 1938 and ceased to do business in Texas, and notified Travis B. Moursund in writing of respondent's revocation of his agency for service in Texas, though no such revocation was ever filed with the Secretary of State, and Petitioner had no knowledge of such revocation until after this suit was filed (R. 126-127). The respondent never appointed any other agent for service after the revocation of its power of attorney to Travis B. Moursund. (Testimony of Mr. Clark, Secretary of State, R. 110-111). Petitioner filed this suit in the District Court of Hidalgo County, Texas on or about April 9, 1938, and citation was issued out of the District Court of Hidalgo County about April 9, 1938, and served by the proper officer in Bexar County, to whom it was directed on Richman & Samuels, Inc., by delivering the same to Travis B. Moursund, its agent. (R. 39, 61 & 62). The suit was removed to the District Court of the United States, for the Southern District of Texas, Brownsville Division, on respondent's petition for removal, proper notice and bond and order of the court made May 30, 1938 (R. 39-40). It is uncontroverted in the pleadings of both parties that petitioner has

been a citizen of the State of Texas, residing in Hidalgo County, ever since sometime prior to 1921, as well as by the evidence. On June 5, 1938, respondent filed its motion to dismiss for lack of jurisdiction over the person and subject matter, improper venue, insufficiency of process and service. (R. 102-103). On October 18, 1939, the trial court filed his memorandum of opinion, sustaining respondent's motion to dismiss, with directions for order accordingly. (R. 278). On October 31, 1939, the order of the trial court was entered, sustaining respondent's motion to quash and dismissing plaintiff's case (R. 290).

On appeal to the Circuit Court of Appeals for the Fifth Circuit, that Court on April 1, 1941, affirmed the judgment of the trial court (118 F. (2d) 1011), and on May 10, 1941, overruled petitioner's motion for rehearing (R. 412), and construed the Texas statute to apply "only to causes of action arising within the State of Texas", without regard for the language used by respondent in said power of attorney, and without regard for the voluntary consent of respondent to be sued in Texas Courts, both State and Federal, on all causes of action "then pending or thereafter to be filed."

Argument and Authorities Under Point of Law No. 2.

Respondent, by appointing Travis B. Moursund its agent in the manner required by the statute, under the provisions of said statute and the language used in said power of attorney, submitted itself to the jurisdiction of the Texas courts, both State and Federal, and consented that service of process may be had upon its agent until it surrendered its permit, and for four years thereafterwards.

In the case of *Neibro Company* v. *Bethlehem Shipbuilding Corporation, Ltd.*, U. S. Supreme Court, 84 L. Ed. 123, 60 S. Ct. 153, 308 U. S. 165, this Court held that the designation of an agent for service, by a foreign corporation, such

as we have in this case, such foreign corporation thereby surrenders and submits itself to the jurisdiction of the courts of that State where it obtains its permit, and waives its plea of privilege to be elsewhere sued, and consents to be sued in the courts of such State, both State and Federal.

In passing upon the question, Mr. Justice Frankfurter says, in part:

> "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. After a period of confusing deviation it was firmly re-established in General Invest. Co. *v.* Lake Shore & M. S. R. Co., 260 U. S. 261, 67 L. Ed. 244, 43 S. Ct. 106, and Lee *v.* Chesapeake & O. R. Co., 260 U. S. 653, 67 L. Ed. 443, 43 S. Ct. 230, over-ruling Ex parte Wisner, 203 U. S. 449, 51 L. Ed. 264, 27 S. Ct. 150, and qualifying Re Moore, 209 U. S. 490, 52 L. Ed. 904, 28 S. Ct. 585, 706 Ann. Cas. 1164. All the parties may be nonresidents of the district where suit is brought. Lee *v.* Chesapeake & O. R. Co. supra. Section 51 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' Commercial Casualty Ins. Co. *v.* Consolidated Stone Co., 278 U. S. 177, 179, 73 L. Ed. 252, 254, 49 S. Ct. 98.
>
> "Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. Commercial Casualty Ins. Co. *v.* Consolidated Stone Co., supra. Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that

courts affix to conduct consequences as to place of suit consistent with the policy behind Sec. 51, which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found.' General Invest. Co. *v.* Lake Shore & M. S. R. Co., supra (260 U. S. at 275, 67 L. Ed. 254, 43 S. Ct. 106).

* * * * * * *

"In conformity with what is now Sec. 210 of the General Corporation Law of New York, Bethlehem designated 'William J. Brown as the person upon whom a summons may be served within the State of New York.' The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: 'The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person Upon Whom Process Against the Corporation May Be Served. * * * The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.' Bagdon *v.* Philadelphia & R. Coal & I. Co., 217 N. Y. 432, 436, 437, 111 N.E. LRA 1916F, 407, Ann. Cas. 1918A, 389. A statute calling for such a designation is constitutional, and the designation of the agent 'a voluntary act.' Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & Mill. Co., 243 U. S. 93, 61 L. Ed. 610, 37 S. Ct. 344.

"In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that 'state legislation and consent of parties may bring about a state of facts which will authorize the courts

> of the United States to take cognizance of a case.' Ex parte Schollenberger, supra (96 U. S. at 377, 24 L. Ed. 854). The judgment below is reversed."

It is submitted, in the light of the above decision, that Respondent, by voluntarily complying with the Texas statute and designating Travis B. Moursund as its agent for service in Texas, waived its privilege to be sued in the district of its domicile, and consented to be sued in the courts of Texas, both State and Federal.

In Restatement of the Law of Conflict of Laws, "Jurisdiction of Courts," Sec. 90, we find the rule stated:

> "A state can exercise, through its courts, jurisdiction over a foreign corporation in so far as the corporation has consented to the exercise of jurisdiction, whether or not the corporation is doing business within the State, and whether or not the cause of action arose out of business done within the State."

Clearly, by voluntarily complying with the Texas statute and by the language used in designating Travis B. Moursund as its Texas agent for service, respondent submitted to the jurisdiction of Texas courts, both State and Federal, and consented to the exercise of such jurisdiction, regardless of whether or not the cause of action arose out of business done within the State of Texas.

With reference to the appointment of an agent for service of process, Sec. 91, Restatement of the Law of Conflict of Laws, states the rule to be:

> "A state can exercise, through its courts, jurisdiction over a foreign corporation which has appointed an agent or a public official in the State to accept service of process in actions brought against the corporation in that State, as to all causes of action to which the authority of the agent or public official to accept service extends. The jurisdiction here exercised is based upon consent. The corporation is bound by its

> consent whether it is doing business in the State at the time the action is brought, or has ceased to do business in the State, or has never done business in the State."

It appears from the above quoted rule that the authority of the agent to accept service of process extends to all causes of action, without limitations, unless such limitations appear either in the statute or in the power of attorney. This is said to be the rule in Subd. c, Sec. 91, Restatement of the Law of Conflict of Laws, reading as follows:

> "If a corporation has appointed an agent or a public official in a State with authority to accept service of process in actions brought against the corporation in that State, the extent of that authority is a question of interpretation of the instrument in which the consent is expressed, and of the statute, if any, in pursuance of which the consent was given. The authority may be interpreted to extend to all causes of action, no matter where arising, brought against the corporation in the State, or it may be limited to causes of action arising within the State; it may be revocable at any time, or it may be irrevocable as to causes of action arising within the State prior to an attempt to revoke it."

A careful analysis of the Texas statute (Art. 2031a, R. C. S. of Tex., 1925 Rev.), together with a careful analysis of the power of an attorney executed by respondent designating Travis B. Moursund its Texas agent for service of process, fails to disclose any limitations or restrictions as to where the cause of action arose, but, on the contrary, applies to all causes of action, "then pending or thereafterwards to be filed." Applying the above quoted rule to both the statute and the power of attorney, we find that they are susceptible of only one interpretation; and the authority of the said Travis B. Moursund to accept service of process on behalf of respondent extended to all causes of

action, regardless of where they arose, and was and is not limited to causes of action arising within the State.

Respondent cannot relieve itself of the jurisdiction of the Texas courts, both State and Federal, by surrendering its permit and ceasing to do business in the State of Texas, as to causes of action arising out of business already done, especially as to causes of action arising out of business done with a citizen of Texas. The rule is stated in Subd. a, Sec. 93, Restatement of the Law of Conflict of Laws, as follows:

> "Having once subjected itself to the jurisdiction of the State by doing business, it cannot by ceasing to do business within the State, deprive the State of jurisdiction as to causes of action arising out of business already done."

Since the decision of this Court in the *Neibro* case was handed down, the opinion was followed by this Court in the case of *Oklahoma Packing Co.* v. *Oklahoma Gas Electric Co.*, 60 S. Ct. Rep. 215; and the lower courts, both trial and appellate, have had occasion to pass on the question decided by Mr. Justice Frankfurter, and his opinion has been approved in the following cases, among others: *Associated Broadcasters* v. *Federal Commission*, 108 F. (2d) 737, 739; *Hinchcliffe Motors, Inc.*, v. *Willys Overland Motors, Inc.*, 30 Fed. Supp. 580, 583; *International Union* v. *Tennessee Copper Co.*, 31 Fed. Supp. 1015; *Fort Wayne Corrugated Paper Co.* v. *Anchor Hocking Glass Corp.*, 31 Fed. Supp. 403; *Detachable Bit Co.* v. *Timken Roller Bearing Co.*, 31 Fed. Supp. 632, 633; *Kirkes* v. *Askew*, 32 Fed. Supp. 802; *Dehse* v. *Hillman Investment Company*, 110 F. (2d) 456; *Ward* v. *Studebaker Sales Corporation of America*, 113 F. (2d) 557; *Canright* v. *General Finance Corporation*, 33 Fed. Supp. 241; *International Union of Mine, Mill and Smelter Workers* v. *Tennessee Copper Company*, 31

Fed. Supp. 1015; *Williams* v. *James*, 34 Fed. Supp. 63 (a very interesting case); *Zwerling* v. *New York & Cuba Mail & S. S. Co.*, 33 Fed. Supp. 721.

We, therefore, submit that under the rules announced by Mr. Justice Frankfurter, the respondent corporation has consented to be sued in the State of Texas, and that the process is valid, and it has waived its privilege, if any, to be sued elsewhere, and the Federal court had jurisdiction over the subject-matter, and process was served on the respondent, over the person of respondent, and the Circuit Court of Appeals for the Fifth Circuit erred in sustaining the judgment of the trial court in quashing the process and in dismissing petitioner's case.

Point of Law No. 3.

Petitioner's contracts with respondent were made in Texas and he performed all his services under such contracts in Texas, and respondent's agents solicited petitioner's business in Texas, therefore, petitioner's cause of action, as a matter of law, arose in Texas.

Statement.

As previously pointed out, it is undisputed in the record the petitioner's contracts with respondent were all made in Texas, and he performed all his services under said contracts in Texas, and respondent's agents solicited petitioner's business in Texas, all of which occurred in the Southern District of Texas, Brownsville Division.

Argument and Authorities.

Article 1995, Subd. 27, Revised Civil Statutes of Texas, 1925 Revision, reads:

> "27. Foreign corporations.—Foreign corporations, private or public, joint stock companies or associations,

not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside."

In passing upon this question, the courts of Texas hold that under the state of facts above recited, the cause of action, as a matter of law, arises in Texas, and in the county where the contracts were made.

In *Stanolind Oil & Gas Co.* v. *Christian*, 64 S. W. (2d) 363, the court, in construing the Texas statute above quoted, says:

> "The requirement that 'part thereof' shall have arisen in the county where the suit is brought is met by proof that the contract was made in that county Early-Foster Co. *v.* A. P. Moore's Sons, 230 S. W. 787; Cuero Cotton Oil Co. *v.* Feeders Supply Co., 203 S. W. 79; Western Wool Commission Co. *v.* Hart, 20 S. W. 131."

In *Hoffer Oil Corp'n* v. *Brian*, 38 S. W. (2d) 596, the Texas court, in passing upon the rule under consideration here, says:

> "It has been held by our Supreme Court (Texas) that no distinction is made, in so far as venue is concerned, between domestic and foreign corporations. Pittsburgh Water Heater Co. of Texas *v.* Sullivan, 115 Tex. 417, 282 S. W. 576; Lakeside Irr. Co. *v.* Markham Irr. Co., 116 Tex. 65, 285 S. W. 593."

The case then holds that a suit on a contract was properly brought in the county where the contract was to be performed.

The trial court and the Circuit Court of Appeals for the Fifth Circuit held, in effect, that petitioner's cause of action arose where petitioner was to be paid for his services, without regard for the fact that his contracts were all made in Texas, his services under such contracts were all performed in Texas, and respondent's agents solicited petitioner's business in Texas. We contend that there is sufficient evidence in the record to establish the fact that petitioner was to be paid for his services and for his produce in Hidalgo County, Texas. The record discloses that he received his drawing account by checks from respondent in Hidalgo County, Texas (R. 168), and respondent was obligated to account to petitioner for produce handled on consignment by delivering an account of sales and remittance therefor to petitioner in Hidalgo County, Texas (R. 169). The record discloses that on one or two occasions petitioner received some compensation from respondent while in New York (R. 317). That fact seems to have led both the trial court and the Circuit Court of Appeals for the Fifth Circuit to the conclusion that petitioner's cause of action arose in New York; and such conclusion is, in view of the Texas statutes and Texas decisions, clearly erroneous.

Consequently, in view of the Texas venue statute above quoted, and the application of the same to a similar set of facts as those prevailing in petitioner's case, by the appellate courts of Texas, petitioner's cause of action, as a matter of law, arose in Texas, and his suit was properly brought in Hidalgo County, Texas, the county of his residence. Therefore, the decision of the trial court and the Circuit Court of Appeals for the Fifth Circuit, that petitioner's cause of action "arose beyond the boundaries of Texas," is clearly erroneous and contrary to the law.

Point of Law No. 4.

Article 2031a, Revised Civil Statutes of Texas, 1925 Revision, applies to causes of action arising out of business conducted by respondent in Texas or had in relation to corporate acts of respondent done in Texas, and is not limited "only to causes of action arising within the State of Texas."

Statement.

As heretofore pointed out, it is undisputed that petitioner is a resident citizen of Texas, that petitioner's contracts with respondent were made in Texas, that his services under such contracts were all performed in Texas, and respondent's agents solicited petitioner's business in Texas; all of which occurred in the Southern District of Texas and in the Brownsville Division thereof.

Argument and Authorities Under Point No. 4.

Both the pleadings and the evidence, without dispute, show conclusively that petitioner's cause of action grew out of contracts that petitioner made with respondent in Hidalgo County, Texas, and out of services performed by petitioner, in pursuance of such contracts; the services being performed in Hidalgo, Starr and Cameron Counties, Texas, in the Southern District of Texas, and in the Brownsville Division thereof.

Under petitioner's Second Point of Law, it is his contention that it is immaterial where his cause of action arose, although he contends under Point Three that his cause of action in fact did arise in Hidalgo County, Texas. We think the most that could be said with reference to this question, under the authorities, is that it is sufficient that the cause of action relate to, and grew out of, business relations had with the respondent in Texas, while it was engaged in business in Texas.

In construing a statute of Louisiana, somewhat similar to the Texas statute, this Court, in the case of *Louisville & N. R. Co.* v. *Chatters* and *Southern Ry. Co. et al.* v. *Chatters*, 49 Sup. Ct. 329, speaking through Mr. Justice Stone, said:

> "Since the Southern was present and subject to the suit in Louisiana, we are concerned, not with the question whether the sale of the ticket was sufficient to bring it there, but only with the question whether, being there, its liability extended to all causes of action arising out of its corporate acts within the State, including this one. No case, either in the Louisiana courts or in this court, has held that it did not. Where jurisdiction has been denied, the cause of action not only arose outside the State, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there. Cf. Old Wayne Mutual Life Ass'n *v.* McDonough, supra (204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345); Simon *v.* Southern Ry. Co., supra (236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492); Mitchell Furniture Co. *v.* Selden Breck Const. Co., supra (257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201). In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the State through the doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the State. Mitchell Furniture Co. *v.* Selden Breck Constr. Co., at page 216 of 257 U. S. (42 S. Ct. 84). But where the cause of action does arise out of a corporate act within the jurisdiction, the presumption would seem necessarily to be the other way."

In the case of *Wefel* v. *W. P. Brown & Son Lumber Co.*, 58 F. (2d) 667, Judge Ervin recently approved of Justice Stone's holding as to the sufficiency of the facts relating to where the cause of action arose, and also made the following interesting statement with reference to consent

when the suit is brought in the Federal court (near the bottom of p. 669):

> "If the federal court could infer from a compliance with its terms by a non-resident corporation a consent to be sued in a federal court of that State, why is not the same consent inferred to service of process in Alabama in the same manner as by the Alabama courts?
>
> "Undoubtedly, that portion of the Alabama statutes requiring the appointment of the agent and its consent for service on him in Alabama gives the right to the federal court to serve its process on such agent, and so bring the corporation into court, to the same extent as it does on its State courts. Why, then should the federal court deny, limit, or give any less efficiency to the portion of the statute as to the method of service?
>
> "If the defendant has by compliance with the statute consented to one part, it has consented to all. If the defendant has consented to the place of suit, it has also consented to the method of service. If the consent as to one applies in the federal court, then also the consent as to the other applies."

We submit, therefore, that when respondent voluntarily complied with Article 2031a, Revised Civil Statutes of Texas, 1925 Revision, and voluntarily executed the power of attorney designating Travis B. Moursund its Texas agent for service of process, respondent voluntarily consented that the Texas courts, both State and Federal, might exercise jurisdiction over any cause of action of petitioner arising out of business conducted by respondent or had in relation to corporate acts of respondent done in Texas; and the Circuit Court of Appeals for the Fifth Circuit erred in holding that said statute applies "only to causes of action arising within the State of Texas."

We now direct the Court's attention to the Perishable Agricultural Commodities Act, Sec. 499b of Title 7, U. S. C. A., and the case of *Iwata* v. *Western Fruit Growers,*

90 F. (2d) 575, which, as we construe the case, clearly holds that under Subdivision (4) of Section 499b, as to carload lots of produce that were consigned by petitioner to the respondent corporation in New York, the respondent in fact was required to truly account to the petitioner promptly in respect of the transactions, and that would mean that account sales on produce consigned by petitioner to respondent, together with remittance to cover the same, would be made by respondent to petitioner in Hidalgo County, Texas; and if that be true, the respondent was obligated to pay petitioner for his produce in Weslaco, Hidalgo County, Texas.

An examination of the record in this case will lead this Court to the inescapable conclusion that petitioner's cause of action relates to and grew out of business relations had with the respondent in Texas, while it was engaged in business in Texas. Consequently, in view of the above quoted decisions, considered in connection with the Texas statute under consideration (Article 2031a, Revised Civil Statutes, 1925 Revision), said statute certainly applies to causes of action arising out of business conducted by respondent, or had in relation to corporate acts of respondent done in Texas, and is not limited "only to causes of action arising within the State of Texas," and the Circuit Court of Appeals for the Fifth Circuit erred in so limiting and construing said statute.

Point of Law No. Five.

Petitioner's causes of action alleged in his pleadings are not barred under the Statute of Limitations of the State of Texas; but are barred under the statute and decisions of the State of New York.

Statement.

As heretofore pointed out, petitioner filed his suit in the 93rd Judicial District Court of Hidalgo County, Texas,

within a few months after he discovered the fraud that respondent had perpetrated upon him.

Argument and Authorities.

Article 5526, Subd. 4, Revised Civil Statutes of Texas, 1925 Revision, provides:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards, all actions of suits in court of the following description: Actions for debt where the indebtedness is not evidenced by a contract in writing."

28 Texas Jurisprudence, Sec. 44, applies the above statute to actions for fraud by use of the following language:

> "An action for damages for fraud is governed by the 2-year statute (Rev. Civ. St., Art. 5526, Subd. 4)."

The tolling of the Statute of Limitation in Texas is suspended until the complainant has discovered the fraud, or has learned facts sufficient to put him upon inquiry. The rule is stated in 28 Texas Jurisprudence, Sec. 68, in the following language:

> "It has been decided many times, and the rule is therefore well settled, that in suit for relief against fraud and deceit, the statute of limitations does not begin to run until the complainant has discovered the fraud, or has learned facts sufficient to put a person of ordinary prudence on inquiry which, if pursued, would have led to discovery."—Citing numerous decisions in support of the rule by the Supreme Court of Texas, including *Port Arthur Rice Milling Co.* v. *Beaumont Rice Co.*, 105 Tex. 514, 143 S. W. 926; *Oldham* v. *Maderis*, 90 Tex. 506, 39 S. W. 919; and *Bass* v. *James*, 83 Tex. 110, 18 S. W. 336.

It, therefore, follows as a matter of law that petitioner's cause of action is not barred by the statute of limitations in the courts of Texas.

Substantially all of petitioner's cause of action was barred by the statute of limitations of the State of New York at the time petitioner discovered the fraud that respondent had perpetrated upon him; and all of petitioner's cause of action is now barred by the statute of limitations of New York State and decisions of the New York State courts.

Carr v. *Thompson*, 87 N. Y. 160;
Middleton v. *Twomby*, 125 N. Y. 520;
Brick v. *Cohn*, 276 N. Y. 259.

Therefore, should petitioner be required to pursue his remedy in the courts of the State of New York, he would be forever barred from recovering the large sums of money alleged to be due him by respondent, and the ends of justice would be defeated.

We, therefore, submit, as a matter of law, justice, and good conscience that petitioner should be permitted to pursue his remedy in the forum of Texas courts.

Point of Law No. Six.

The act of respondent, on the 25th day of January, 1938, in attempting to revoke the power of attorney of Travis B. Moursund as its agent for service in Texas, without immediately appointing a new agent for that purpose and without filing notice of such revocation in the office of the Secretary of State of the State of Texas, was ineffective for the purpose of defeating the validity of the process served upon Travis B. Moursund in petitioner's case, as said power of attorney was contractual in its nature and coupled with an interest and irrevocable under Article 2031a, Revised Civil Statutes of Texas, 1925 revision, until four years after the 19th day of January, 1938, that being the date that respondent surrendered its permit to do business in Texas and ceased to do business in Texas.

Petitioner's Statement Under His Sixth Point of Law.

Petitioner will adopt his statement under his second point of law, as contained in this brief, as his statement under this, his sixth point of law, and will add thereto the following:

On the 25th day of January, 1938, the defendant, in writing, notified its agent, Travis B. Moursund, of its withdrawal from Texas, and their revocation of his appointment as the statutory agent in Texas for service, of the respondent, though no such revocation of notice thereof was filed with the Secretary of State of the State of Texas, and the plaintiff, T. E. Stephens, had no knowledge of such revocation until after this suit was filed (R. 127).

As showing that no other agent has ever yet been appointed by the respondent in place of Travis B. Moursund after it attempted to revoke his authority as respondent's statutory agent for service in Texas, the petitioner took the deposition of the then Secretary of State, Edward E. Clark, who testified that he was appointed Secretary of State November 16, 1936, and the appointment became effective January 19, 1937, and he was still acting secretary when his deposition in this case was taken; that the power of attorney appointing Travis B. Moursund as agent for service in Texas, for respondent, was filed in his office on July 30, 1934; that no other person than Travis B. Moursund was ever appointed agent in Texas for Richman & Samuels, Inc. (R. 111). He further testified that there is no record in his office to show that any other person, other than Travis B. Moursund, was ever appointed as agent in Texas to represent the defendant (R. 111). And continuing, that there is no record in his office of any instrument revoking the power of attorney designating Travis B. Moursund as agent for service in Texas for Richman & Samuels, Inc. (R. 110-111). This deposition was taken on the 6th day of

December, 1938. (See certificate of the notary taking Clark's deposition, R. 112).

Argument and Authorities.

Petitioner contends under his Sixth point of law that respondent's attempt at revocation of its power of attorney for Travis B. Moursund to represent it in this State for service purposes, was ineffectual to escape from the jurisdiction of the courts of Texas as to any action brought, especially by a citizen of Texas, or one arising out of the contract made while the corporation is engaged in business in Texas.

Discussing the question of the revocation of the authority of a State agent for service by a foreign corporation, we quote the following from 21 R. C. L., Sec. 94, p. 1344:

> "It seems to be the rule in some jurisdictions that such revocation of authority is effectual although the liability of the corporation was incurred while it was doing business in the State. But the prevailing rule is that a corporation cannot by revoking the authority of the agent and withdrawing from the State escape from the jurisdiction of the courts of the State as to an action brought by a citizen of the State or one arising from a contract made while the corporation is engaged in business in the State; and it is immaterial whether the appointee for service is a state officer, or a private person."

Then again, in 12 R. C. L., Sec. 89, p. 113, the rule on the point announced as follows by the text:

> "* * * It is generally held that a foreign corporation, which has to be admitted to do business within a State upon the condition that it execute a power of attorney for service of process to a general agent or State office, CANNOT, after having designated some person for service of process and carried on business within the State, ESCAPE FROM THE JURISDICTION OF

THE COURTS OF THE STATE OVER ACTIONS BROUGHT BY RESIDENTS THEREOF, with whom it has contracted under the permission to do business therein, by revoking the power of attorney for service of process and ceasing to do business within the State * * *'' (Caps ours).

The rule, as stated in the text above quoted, is supported by a long list of authorities.

Turning, now, to *Corpus Juris*, Vol. 14A, Sec. 4140, p. 1415, there the text states the rule under consideration, in these words:

"Service cannot be made on a person appointed to receive service where the appointment has been revoked, or where there has been a subsequent formal appointment of another person as sole agent to receive service. On the other hand, except in some jurisdictions, service on a person who has been appointed a statutory agent to receive service of process and whose appointment as such has not been revoked, so far as the public records disclose, either expressly or by the appointment of another agent, is sufficient, even though he is no longer in the actual service of employment of the company. A revocation of the power of an agent on the eve of institution of suit against the corporation on a claim of which it has notice, savors of bad faith, and will not be permitted to frustrate a suit commenced by service on such agent."

In the case of *Meixell* v. *American Motor Sales Co.*, 103 N. E. 1071, the court, in passing on the question before us said:

"The question presented by the plea is: Can a foreign corporation which has complied with the statutes of this State, under Sections 4086, 4089, Burns 1907, on coming into this State to transact business, upon discontinuing that business and removing all its property from the State, and having no agency, agent or repre-

> sentative of any kind, or property, moneys, or credits in the State, revoke the agency created on its entry into the State, by filing such attempted revocation in the office of the Secretary of State before suit is brought, when the agent has removed from the State not on any business of the corporation, he being at the time neither an officer nor stockholder in the corporation, and having no connection therewith, where also there has been no attempt at substitutions of another agent to receive service, where the cause of action arises out of a contract made in this state, with the corporation whilst it was engaged in the exercise of its franchises and the transaction of business in this State, under its agreement with the State, so as to defeat jurisdiction of such personal action?"

After stating the above question, the court proceeded to an analysis of the State statute under consideration, and concludes by saying:

> "It is scarcely necessary to point out that the permission within constitutional limits to exercise its franchise is a sufficient contractual consideration for the agreement in regard to service on it."

And, continuing, it in effect holds that such statutes are enacted for the benefit of citizens or residents who have business in the State with such a corporation and enter into contracts with it, and concludes that such a power is coupled with an interest, and is irrevocable so long as an interest in the subject-matter of that power continues. The court concludes with these words:

> "Taking the whole scope and purpose of the Act, its spirit and intent, the statutory requirement is a continuing one, so long as a liability exists arising out of business transactions in this State, for if this be not so, it can have no object, a conclusion which will not be attributed to the legislative branch."

In the case of *King* v. *American Tank & Equipment Corp.*, 144 So. 283, the court had under consideration there the

construction of a Louisiana statute somewhat similar to the Texas statute. Here is what the court said, in passing upon the question of revocation without appointing another agent:

> "The language of the Act is plain and needs no interpretation. As long as any outstanding liability remains against the corporation, service upon the agent appointed by said corporation upon whom service of process is to be made, is a legal and valid service, and as long as that liability remains outstanding a revocation of the agent's authority is without avail. There is nothing in the Act to limit to citizens of this State only. The only limitation is that the liability must have grown out of or connected with the business done by said corporation in this State."

The court then quotes with approval the following from the decision in *Western Grocery Co.* v. *New York Over Sea Co.*, 296 Fed. 269.

> "It is at once apparent that, to permit a corporation to accept the benefits of his state, and, after it had entered into contracts, to evade jurisdiction by withdrawing its agent, would be in the highest degree unequitable and unjust.

And then cites with approval the following quotation from *Davis* v. *Kansas & Texas Coal Co.*, 129 Fed. 149:

> "A state has the power, if she allows a corporation to enter her confines, to determine the condition on which the entry shall be made and the right to enforce any condition so imposed. The power to exclude embraces the power to regulate, and the power to enact and enforce such regulations.
>
> "When a foreign corporation undertakes to transact business in a State other than that in which it is incorporated, it submits itself to the authority of the courts of such other State and is bound by the statutory pro-

visions respecting the method of such courts obtaining jurisdiction over it. United Oil & Natural Gas Prod. Corp. *v.* United Carbon Corp., 171 La. 374, 131 So. 52."

Before concluding our reference to a few more cases, we desire to call the Court's attention to *Hunter* v. *Mutual Reserve Life Insurance Co.*, 31 Sup. Ct. Rep. 127, as showing that some courts view the question of revocation under consideration as being contractual, and the Supreme Court said:

> "It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions, as to where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of someone or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature, was given upon consideration that defendant should have the right to carry on its business in the State, and for the protection of those who should deal with the defendant."

The last quotation has been quoted with approval by many of the courts of this land.

In the case of *Kelly* v. *Johnson Nut Co.*, 38 F. (2d) 177, the question before the Court was one of service on a designated agent. The Code of Ohio provided for service on the Secretary of State if the Company did not have an agent, or in the event the agent's designated authority was revoked. Passing on the question, the Court used this language.

> "The precise question confronting us is whether, under the liberal construction in furtherance of the general purpose to which we think the statutes are entitled, the right to serve the corporation, by service

upon a designated agent, survives the revocation (for nonpayment of taxes) of authority to do business within the State, as to suits founded upon business transacted there before revocation and withdrawal.

"It seems manifest that if the statute expressly provides that the power of attorney shall be irrevocable, or validates service upon a State officer, as long as any liability of the company remains outstanding in such State, such provisions are valid and withdrawal from the State is ineffective to defeat such service."

Citing *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 591, 31 S. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *Insurance Company* v. *Scott*, 48 S. E. 581; *Kraus* v. *American Tobacco Co.*, 283 Pa. 146, 129 A. 60; *Wilson* v. *Martin-Wilson Reserve Fund Life Ass'n.*, 119 Fed. 617.

And then continuing, the Court further said:

"The same principle has been applied where the statute provides for the appointment of an agent to receive service of process 'in any action' thereafter instituted."

Citing *Home Ben. Soc. of N. Y.* v. *Muehl*, 59 S. W. 520; *Commonwealth* v. *Provident Sav. Life Assur. Soc.*, 159 S. W. 698; *Chelais River Lbr. Co.* v. *Empire State Surety Co.*, 206 Fed. 559.

And further continuing, the Court said:

"In such a case the agency is said to be irrevocable as one coupled with an interest on behalf of resident creditors. Frazier *v.* Steel & Tube Co. of America, 132 S. E. 723, 45 A. L. R. 1442; McClamroch v. Southern Surety Co., 187 N. W. 41. Or, more properly, we think, the designation of an agent to receive service of process, as a condition precedent to doing business within the State, is regarded as a contract for the benefit of resident creditors, to submit to jurisdiction, which applies to all liabilities created within the State, and which, as to such liabilities, is irrevocable."

Other authorities holding that the appointment of a designated agent for service, as a condition precedent for a foreign corporation to obtain a permit to do business in a State, is, in a sense, a contract for the benefit of resident creditors as to all liabilities arising in such State, are: *Magoffin* v. *Mutual Reserve Fund Life Assn.*, 91 N. W. 1115; *Woodward* v. *Mutual Reserve Life Ins. Co.*, 71 N. E. 10; *Western Grocery Co.* v. *N. Y. Oversea Co., Inc.*, 296 Fed. 269, and *Davis* v. *Kansas & Tex. Coal Co.*, 129 Fed. 149.

Concluding in this *Kelly-Johnson* case, Judge Hilkenlooper says this, in construing the Act of the Legislature before him with reference to the revocation of the Power of attorney appointing an agent for service, of a foreign corporation:

> "This has a direct bearing upon the scope to be given to Section 179, for it is not conceivable that the Legislature intended that process might be served upon the foreign corporation after revocation of its right to do business in Ohio because of failure to appoint a new agent, but did not intend such survival in the event of a new agent, but did not intend such survival in the event of a revocation of the same authority for any other cause or upon voluntary withdrawal. By necessary implication, the intent would rather seem to be that authority of the agent to receive service of summons continued as long as there were unsatisfied liabilities incurred within the State before withdrawal and while the agent was available for this purpose; but if such agent died or removed from the State, whether before or after withdrawal of the corporation therefrom, the obligation to appoint a new agent was imposed upon such corporation, as to such liabilities, and on failure so to do, service might be made upon the Secretary of State." (Citing authorities.)
>
> "So construing the provisions of these sections, it follows that their terms constituted a contract by the

defendant below for the benefit of plaintiff, among others, which contract was read by implication into the contract between plaintiff and defendant. Having withdrawn from the State while the liability to plaintiff, which was incurred within the State before withdrawal, still remained unsatisfied, and service having been made upon the person designated by the defendant to receive such service, the court below erred in holding such service invalid, and the judgment is

"Reversed."

The above authorities construed statutes different from Article 2031a of Texas, but practically every statute prescribed in the appointment of a State agent for service as a condition precedent of a foreign corporation obtaining a permit to do business in that State, has a limitation of some character, some limiting the service as to causes of action arising in the State, others to demands unsatisfied arising out of business in the State; and the Courts have invariably viewed the matter, where the statute did not in its terms provide that the power of attorney be irrevocable, as one based either upon a contractual relation with creditors of the corporation doing business in the State where it obtained a permit, or as a power coupled with an interest. In most cases, it has been held that the power is irrevocable as long as demands are unsatisfied, that grew out of the business of the company after it obtained a permit to do business in the State, or that arose out of transactions of business had in the State.

Section 3 of said Article 2031a reads:

"In the event of the death, resignation or removal of said agent so appointed, or the revocation of said power of attorney by said corporation, said FOREIGN CORPORATION SHALL IMMEDIATELY substitute the name of some other individual by similar power of

attorney as is required by this Act, so that AT ALL TIMES an agent shall be available upon whom service of process may be had as provided herein." (Caps ours.)

The Texas statute goes further than any other similar statutes that have been considered by our courts. The only limitation in the Texas statute as to the power of attorney is a limitation in point of time. The power of attorney required by the Texas statute shall remain in full force and effect so long as said corporation is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or ceased to do business in Texas. Then, as a condition precedent to the right of the foreign corporation to revoke its power of attorney, our Texas statute has clearly expressed the intention of the Legislature by providing it shall not become effective unless the corporation immediately substitute some other person, "so that at all times an agent shall be available upon whom service of process may be had, as provided herein."

We, therefore, submit the proposition that, in view of the above authorities, and the language of the statute and the powers authorized by the power of attorney, the attempt of respondent to cancel the power and authority of its Texas agent was ineffectual to destroy the validity of the process served by petition upon said agent, when said attempted revocation was not filed for record with the Secretary of State and no other agent was named by respondent, and petitioner had no knowledge of such attempted revocation until long after his suit was filed.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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APPENDIX.

Chapter 202 of the General Laws of the State of Texas passed by the 43rd Legislature, Regular Session, p. 606.

(This Act of the Legislature of Texas, with omission of the caption, enacting clauses and emergency clause, constitutes Art. 2031a of Vernon's Annotated Revised Civil Statutes of Texas,—containing the Revised Statutes of 1925 and later general laws—and is commonly referred to as Art. 2031a of the Revised Statutes of Texas.)

S. B. No. 52:

"Service of Process on Foreign Corporations."

Chapter 202.

An Act further regulating and providing a means and method of securing service of process on foreign corporations hereafter seeking a permit to do business in Texas and those doing business in Texas on the effective date of this Act; requiring such foreign corporations to designate and appoint a service agent upon whom service of process may be had; affixing penalties for a violation hereof, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas.

"Section 1. From and after the effective date of this Act, each and every foreign corporation seeking a permit to do business in this State, and as a prerequisite to its right to secure a permit to do business in Texas, and each and every foreign corporation already having a permit to do business in this State on the effective date hereof, shall file in the office of the Secretary of State a power of attorney designating some individual who is a resident citizen of this State, as its service agent, upon whom process may be served in all suits, proceedings and causes of actions pending or hereafter filed in this State, in which said foreign corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or

has ceased to do business in Texas; provided, however, that each foreign corporation having a permit and doing business in Texas on the effective date hereof, shall have ninety days after the effective date hereof, within which to comply with the requirements of this Act.

"Sec. 2. The power of attorney required by this Act shall, in addition to stating the name and address of the agent, also stipulate that said agent is appointed as the corporation's service agent in Texas, and that said foreign corporation consents to the service of process upon said agent and that he shall be deemed as the service agent of said corporation for all intents and purposes as contemplated by the statutes requiring such designation and appointment; said power of attorney shall be acknowledged by the President or Vice-President, attested by the Secretary and acknowledged in manner and in form as is required in the acknowledgement of deeds in the State of Texas; said power of attorney shall, when executed, be filed in the office of the Secretary of State and shall become a part of the records in said office.

"Sec. 3. In the event of the death, resignation or removal of said agent so appointed, or the revocation of said power of attorney by said corporation, said foreign corporation shall immediately substitute the name of some other individual by similar power of attorney as is required by this Act, so that at all times an agent shall be available upon whom service of process may be had as provided herein.

"Sec. 4. Nothing herein contained shall be construed as repealing any statute in force in this State in reference to service of process on foreign corporations, but this Act shall be construed and held cumulative of all existing statutes, and service of process in all suits against foreign corporations may be had as is now provided by law, or as provided in this Act, or by all of such methods.

"Sec. 5. If any corporation which is required by the terms of this Act to file the power of attorney and designate a service agent as provided by this Act, shall fail to do

so at or within the time as required by this Act, then in such event:

"(a) Each of its acts in this State shall, as to it, be unlawful and void and none of such acts shall, as to it, be valid; and it shall be incapable in this State of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity that shall not already have accrued, provided that none of its acts done subsequently to the filing of such a power of attorney, though such filing be late, shall be effected by the foregoing provisions, nor in case of such late filing shall the incapacity affected by the foregoing provisions apply to any right, power, privilege or immunity that shall have wholly arisen and accrued after such filing.

"(b) Such corporation shall be incapacitated to maintain any suit or legal proceedings in any court in this State upon any demand whether arising out of contract or tort.

"(c) Such corporation shall be liable to the State of Texas in the penal sum of Fifty ($50.00) Dollars, per week for each and every week in which it shall have so failed to file any such power of attorney, same to be recoverable by the Attorney General in the name of the State of Texas, in any court of competent jurisdiction in Travis County, Texas.

"(d) Such corporation, by doing any act within this State, shall be deemed to have appointed the Secretary of State and his successors in office, to all intents, affects and purposes as if it had duly executed such power of attorney.

"Sec. 6. If any paragraph, section or subsection of this Act shall be held or deemed invalid or unconstitutional, such invalid or unconstitutional part or parts shall not in any manner affect the remaining paragraph, section or subsection, but all such remaining parts shall be held to be expressive of the wish of the Legislature, regardless of the invalidity of any paragraph, section or subsection hereof.

"Sec. 7. The fact that there is no adequate statutory provision in this State regulating the service of process on foreign corporations, especially foreign corporations, which

might cease to do business in Texas and have no agent in Texas upon whom process may be served, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and said Rule is suspended and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"(NOTE.—S. B. No. 52 passed the Senate, April 24, 1933, by a vote of 24 yeas, 0 nays; Senate concurred in House amendments, May 25, 1933, by a vote of 29 yeas, 0 nays; passed the House, with amendments, May 25, 1933, by a viva voce vote.)

"Approved June 6, 1933.
"Effective 90 days after adjournment."

(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 299.

T. E. STEPHENS,

Petitioner,

—against—

RICHMAN & SAMUELS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MORRIS CUKOR,
Counsel for Respondent,
New York City, New York.

SANFORD SOLARZ,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 299.

T. E. STEPHENS,

Petitioner,

—against—

RICHMAN & SAMUELS, INC.,

Respondent.

BRIEF OF RESPONDENT.

I.

Opinions Below.

The opinion of the United States District Court for the Southern District of Texas, Brownsville Division has not been reported but will be found on pages 278-291 of the Record. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 118 Fed. (2d) 1011 and appears on pages 402-404 of the Record.

II.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on

April 1, 1941 (R. 404). Petition for a rehearing was filed by petitioner on April 14, 1941 (R. 405-411) and was denied on May 10, 1941 (R. 412).

Petition for a writ of certiorari was filed in this Court on July 22, 1941. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938.

III.

Questions Presented.

1. Was jurisdiction acquired in this suit over the person of the respondent by virtue of either the Texas Statute or the appointment by the respondent of a service agent in Texas when (1) before this suit was commenced and service of process attempted, respondent had ceased doing business in, had withdrawn from, and had cancelled its permit to do business in Texas and had revoked its appointment of the service agent upon whom service in this suit was attempted, (2) when neither at the time this suit was instituted and service attempted, or at any time since, was respondent doing business in Texas, and (3) when the causes of action asserted by the petitioner (a) arose outside of Texas, (b) and/or accrued before Article 2031A of the Revised Civil Statutes of Texas (the statute relied upon by petitioner and hereinafter referred to by us as the Texas Statute) was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein, and/or (c) arose out of transactions in interstate commerce?

2. Has this Court the power to review the findings and rulings of the lower courts when the petitioner

failed to object or take exception to or challenge the sufficiency by motion or otherwise of any finding or ruling of the District Court, or to request the District Court to make any finding or ruling in his favor, or to make any motion for judgment in his favor; and further, when petitioner in his "Statement of Points on Which He Intends to Rely on Appeal", filed by him in connection with his appeal to the Circuit Court, failed to complain of or challenge any finding or ruling of the District Court or challenge the sufficiency of the evidence to support the findings, or rulings or conclusions based upon such findings, and failed to quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling?

3. If this Court has such power, are the findings of the lower courts that the several causes of action asserted by petitioner arose outside of Texas and the finding by the District Court that the causes of action, with the exception of one item involving the sum of $62.78, arose before the Texas Statute was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein, so clearly erroneous as to justify this Court in disturbing them?

Petitioner, on page 6 of his brief, states that one of the questions presented is whether or not the revocation by the respondent of its appointment of the service agent upon whom service of process in this suit was made was effective to invalidate such service. This is not a proper question because, as we shall show under Point V of this brief, no jurisdiction would have been acquired in this suit even if respondent had not revoked said appointment, although, as we shall also show under said point, the

revocation of said appointment by the respondent was effective to defeat service of process in this suit.

In connection with the first question, both lower courts held that no jurisdiction was acquired over the person of the respondent by virtue of either the Texas Statute or the appointment by the respondent of a service agent because it was not doing business in Texas when sued and the several causes of action arose outside of Texas; the District Court further held that no jurisdiction was acquired because the causes of action accrued before the Statute was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein; but neither court made any finding as to whether the causes of action arose out of transactions in interstate commerce, or made any ruling as to whether or not the statute or the appointment applied to such causes of action.

IV.

Statute Involved.

Petitioner has given the complete text of Article 2031A of the Revised Civil Statutes of Texas in the appendix to his brief, pages 50-53. For purposes of clarity, however, we shall quote here what we consider the material portions of said statute:

> "Section 1. From and after the effective date of this Act, each and every foreign corporation seeking a permit to do business in this State, and as a prerequisite to its right to secure a permit to do business in Texas, and each and every foreign corporation already having a permit to do business in this State on the effective date hereof, shall file in the office of the Secretary of

State a power of attorney designating some individual who is a resident citizen of this State, as its service agent, upon whom process may be served in all suits, proceedings and causes of actions pending or hereafter filed in this State, in which said foreign corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas;

"Sec. 5. If any corporation which is required by the terms of this Act to file the power of attorney and designate a service agent as provided by this Act, shall fail to do so at or within the time as required by this Act, then in such event:

"(b) Such corporation shall be incapacitated to maintain any suit or legal proceedings in any court in this State upon any demand whether arising out of contract or tort.

"Sec. 7. The fact that there is no adequate statutory provision in this State regulating the service of process on foreign corporations, especially foreign corporations, which might cease to do business in Texas and have no agent in Texas upon whom process may be served, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and said Rule is suspended and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Approved June 6, 1933.

"Effective 90 days after adjournment."

V.

Statement of the Case.

The following facts are not disputed:

1. This suit was filed against respondent in the District Court of Hidalgo County, Texas on April 9, 1938 (R. 38-39) and service of citation was made upon Travis B. Moursund in Bexar County, Texas on April 12, 1938 (R. 61-62). Subsequently, on application of respondent, the suit was removed to the United States District Court for the Southern District of Texas, Brownsville Division (R. 39-40).

2. On January 19, 1938, which was prior to the time this suit was commenced and service of citation attempted, respondent, a New York corporation, had ceased doing business in, had withdrawn from, and had cancelled its permit to do business in Texas; and respondent was not doing business in Texas at the time this suit was commenced and service attempted or at any time since (R. 126-7, 284),

3. On January 25, 1938, which was prior to the time this suit was commenced and service of citation attempted, respondent by an instrument in writing revoked the appointment of the said Travis B. Moursund as its agent for service of process (R. 61-62, 126-127, 278-279),

4. Respondent did not come into existence until August 1925, when it became incorporated under the laws of the State of New York (R. 18-19, 284),

5. Respondent did not obtain a permit to do business in Texas until August 13, 1934 (R. 113, 284; 403), and on July 30, 1934 it executed and filed in the office of the Secretary of the State of Texas the appointment of Travis B. Moursund as its agent for service of process in Texas (R. 120-1, 110).

Both lower courts concurred in finding upon the evidence that the several causes of action asserted by petitioner in this suit arose outside of the boundaries of Texas (R. 282-284, 289, 402-404). The District Court further found that, with the possible exception of an item involving the sum of $62.78, all the causes of action were based upon transactions which occurred before the Texas Statute went into effect on September 1, 1933, and, therefore, before respondent obtained its permit to do business in Texas on August 13, 1934 and before respondent appointed a service agent in Texas on July 30, 1934 (R. 289-290).

Respondent's motion to dismiss this suit for lack of jurisdiction over its person was heard and determined upon the evidence. Petitioner testified that for the 1922-23, 1923-24, and 1924-25 seasons he was employed by the partnership of Richman & Samuels, whose place of business was in New York City, as their Texas manager, his compensation to be a fixed salary plus a share of the profits (R. 24-25, 152, 158, 161-2, 305-6, 308, 311-13, 315-16, 331). As to these seasons petitioner testified that his fixed salary was paid and his only claim is for a share of the alleged profits (R. 332-333); that as to each of these seasons, the partnership kept at its New York offices all the books, records, and accounts (R. 148, 307, 317, 321, 323, 325, 331), and there rendered accountings and made payments to him of what they considered his

share of the profits (R. 308, 314, 317-18, 321, 323, 326, 329, 332-33).

Petitioner alleges in his complaint that on June 1, 1925 his employment was continued by said partnership for the 1925-26 season (R. 69), and he testified that he went to New York some time in the summer of 1925 and there probably, although he was not certain, entered into a contract of employment with the partnership for said season (R. 317-318). Petitioner alleges in his complaint that respondent became incorporated under the laws of the State of New York in August, 1925, with its principal place of business in New York City, and that at such time it assumed all of the liabilities of the partnership as well as the contract of employment which was previously entered into between him and the partnership for the 1925-26 season (R. 68-69). However, petitioner nowhere alleges that respondent agreed to assume or pay said liabilities or assume or perform said contract in Texas; as to the evidence, the record is completely devoid of one scintilla of evidence that respondent agreed to assume or to pay in Texas or elsewhere the liabilities of the partnership (R. 283, 403).

Petitioner testified that he was employed by the respondent for the 1926-27 season and in answer to the question as to where his contract of employment for that season was made, he said, "I wouldn't say definitely just where it was made; maybe in Weslaco, maybe in New York" (R. 319-20, 324). Petitioner admits in his complaint and he testified that his employment with the respondent terminated in June 1927 and that at no time thereafter was he in its employ (R. 70-73, 321, 325). As to each of said seasons, to wit, 1925-26 and 1926-27, petitioner testified that his fixed salary was paid and that he claims only for his share of the profits for these seasons (R.

332-3); that all books, records, and accounts were kept by respondent at its New York office (R. 319, 321, 323, 325, 331); that respondent rendered an accounting to him and settled with him at its New York offices for what it considered his share of the profits for the 1925-26 season (R. 319, 320-1, 323, 333), but that it never made an accounting to him for his share of the profits of the 1926-27 season (R. 157, 325). The record is wholly lacking in any evidence of any agreement by the partnership or the respondent to pay in Texas for the petitioner's services (R. 283). As shown by petitioner's complaint and testimony, the only claims that petitioner asserts against respondent after June 1927, when his employment by respondent terminated, are in connection with alleged shipments of produce on consignment from Texas to respondent in New York City to be sold by the respondent on a commission basis for the accounts of various companies in Texas to whose rights and interests petitioner alleges he succeeded (R. 72, 74-5, 325, 329-30). Petitioner testified that there was no express agreement with the respondent as to any of these shipments and that each shipment constituted a separate transaction (R. 328-9, 374-5); that all books and records concerning these shipments were made and kept by respondent at its New York offices (R. 321-3, 325, 329, 331); and that all accounts and payments in connection with these shipments were made by respondent at its New York offices (R. 322-3, 329, 333).

Without complying with court rules, petitioner filed an amended complaint and annexed thereto as exhibits itemized schedules purporting to show the various amounts he seeks to recover in this suit and the dates of the transactions with which they were connected (R. 88-101). These exhibits show that, with the exception of one item of $62.78 which allegedly is con-

nected with a transaction in February 1935 (R. 89), all transactions involved in this suit occurred before the Texas Statute was enacted, before respondent obtained a permit to do business in Texas on August 13, 1934, and before respondent appointed an agent for service of process in Texas on July 30, 1934. Exhaustive examination of not only the petitioner but also his witnesses failed to produce one shred of evidence of any transactions with the partnership or the respondent other than those shown in the aforesaid exhibits (R. 173, 326-28, 372-78, 335-6, 348, 383, 267-8).

Both lower courts held that no jurisdiction was acquired over the person of the respondent in this suit because the several causes of action asserted by petitioner arose outside of Texas and the respondent was not doing business in Texas at the time this suit was instituted or at any time since. The District Court held as a further ground for its decision that, with the exception of the aforesaid item of $62.78, all of the causes of action accrued before the Texas Statute went into effect and before respondent secured a permit to do business in Texas and appointed an agent for service of process in Texas. Petitioner failed to object or take exception to, or challenge the sufficiency by motion, or otherwise, of any finding or ruling of the District Court, nor did he make any motion for judgment in his favor, although he had ample time to do so between the date on which the District Court filed its memorandum of findings and decision (R. 278) and the date of the entry of the final order of dismissal (R. 290-1). The only exception taken by the petitioner was to the entry of the final judgment by the District Court (R. 291). In appealing to the Circuit Court of Appeals from the judgment of the District Court, the petitioner elected to file a "State-

ment of Points on Which He Intends to Rely on Appeal" (R. 291-297); but nowhere in said statement did petitioner complain of or challenge any finding or ruling of the District Court, nor did he challenge the sufficiency of the evidence to support the findings or rulings or conclusions based upon such findings, nor did he quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling.

Petitioner now seeks review on writ of certiorari of the judgment of the Circuit Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court quashing the service of citation and dismissing this suit for lack of jurisdiction over the respondent's person.

POINT I.

A.

This Court has no power to review the evidence or the findings of fact made by the lower courts because of the failure of the petitioner to preserve these matters for review.

The Authorities.

Harvey Co. v. *Mallory*, 288 U. S. 415;
Fleischmann v. *U. S.*, 270 U. S. 349;
Union Bleachery v. *U. S.*, 79 Fed. (2nd) 549;
Massachusetts etc. v. *Preferred, etc.*, 110 Fed. (2nd) 764;
Drybrough v. *Ware*, 111 Fed. (2nd) 548;
Butler v. *U. S.*, 108 Fed. (2nd) 27;
Bank of Waterproof v. *F. & D. Co.*, 299 Fed. 478.

The rule has been firmly established by this Court, as well as other Federal Appellate Courts, that they

have no power to review the evidence or the trial court's findings of fact upon such evidence when, as in the instant case, the appellant has failed to object or except to any evidence or ruling of the trial court, has failed to challenge by motion or otherwise the sufficiency of the evidence to support any finding or ruling of the trial court or has failed to request the trial court to make any finding or ruling in his favor, and the only exception which he has taken is to the entry of the final judgment. Therefore, this Court should not give consideration to any of the contentions of the petitioner as to what the evidence shows with respect to where his alleged contracts with respondent were made, where his services were performed, where he was to be compensated for his services, where respondent's agents solicited his business, whether the causes of action grew out of business that respondent may have done in Texas, or where the causes of action arose. As was said in *Union Bleachery* v. *U. S.*, 79 Fed. (2nd) 549 (*supra*):

> "It is well settled, of course, that the findings of the trial judge in a case such as this have the effect of the verdict of a jury, and that, even where properly excepted to, they will not be disturbed if supported by any substantial evidence. It is equally well settled that we will not review the findings of fact to ascertain whether they are supported by substantial evidence, or pass upon questions of law not apparent upon the face of the primary record, unless the attention of the court below has been directly drawn thereto and right of review has been preserved by exception duly and seasonably entered (cases cited). * * *
>
> "This rule requiring specific exceptions is not an arbitrary or technical one. Its purpose is

> to require counsel, at the proper time, to call attention to the claimed error with such certainty and definiteness that the court will understand clearly the precise action which is attacked or the precise action which is sought to be obtained, and will have opportunity to correct its ruling with respect thereto if convinced that it is erroneous. The vice of a general exception is that it calls the attention of the court to nothing except that the defeated litigant is not satisfied with the judgment against him."

Further, not a single one of the "Statement of Points on Which He Intends to Rely on Appeal", submitted by petitioner to the Circuit Court of Appeals (R. 291-7), was sufficient to present any reviewable question to that court because nowhere in said statement did petitioner complain of any finding or ruling of the District Court, nor did he challenge the sufficiency of the evidence to support the findings of fact of the District Court or the rulings or conclusions of the District Court with respect to such findings, nor did he quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling. See *Butler, et al.* v. *U. S.*, 108 Fed. (2nd) 27 (*supra*).

B.

The findings of the lower courts should not be disturbed by this Court because not only are they not clearly erroneous but they are substantially supported by the evidence.

The Authorities.

U. S. v. *O'Donnell*, 303 U. S. 501;
Pick Manufacturing Co. v. *General Motor Co., et al.*, 299 U. S. 3;

Page v. *Arkansas Gas Co.*, 286 U. S. 269;
U. S. v. *Commercial Credit Co. Inc.*, 286 U. S. 63;
Rutland, et al. v. *Wilson*, 108 Fed. (2nd) 92.

Both lower courts concurred in finding that the causes of action arose outside of Texas (R. 282-84, 289, 402-4). The District Court further found that, with the possible exception of one item involving $62.78, all causes of action accrued prior to the enactment of the Texas Statute and prior to the time respondent obtained a permit to do business and appointed a service agent in Texas (R. 289-90). These findings are substantially supported by the evidence (This brief, pp. 7 to 10). Certainly they are not so clearly erroneous as to justify this Court in disturbing them. As this Court said in *Pick Manufacturing Co.* v. *General Motor Co., et al.*, 299 U. S. 3 (*supra*):

> "Under the established rule this Court accepts the findings in which two courts concur unless clear error is shown."

And as was said in *Rutland, et al.* v. *Wilson*, 108 Fed. (2nd) 92 (*supra*):

> "A careful consideration of appellant's complaint of the fact findings in the light of the established rule that such findings will not be disturbed on appeal, unless shown to be clearly erroneous, convinces us that the complaint must be rejected."

POINT II.

No jurisdiction was acquired over respondent's person since neither the Texas Statute nor the appointment by respondent of a service agent applies to a suit, such as this, brought against respondent, a foreign corporation, after it had ceased doing business in Texas upon causes of action arising outside of that state.

The Authorities.

Chipman v. *Jeffrey*, 251 U. S. 373; 64 L. Ed. 314; 40 S. Ct. 172;

Mitchell, etc. v. *Selden*, 257 U. S. 213; 66 L. Ed. 20; 42 S. Ct. 84;

Hunter v. *Mutual, etc.*, 218 U. S. 573; 31 S. Ct. 127;

Morris & Co. v. *Scandinavia, etc.*, 279 U. S. 405; 73 L. Ed. 762; 40 S. Ct. 360;

Morris & Co. v. *Scandinavia, etc.*, 81 Fed. (2nd) 346;

Ambrose Johnson v. *Richman & Samuels, Inc.* (U. S. District Court, Southern District of Texas, Laredo Division, opinion not published, see appendix, pages i to iv);

Moore v. *National Hotel, etc.*, 21 Fed. Supp. 177;

Missouri Pacific, etc. v. *Clarendon Co.*, 257 U. S. 533;

Simon v. *Southern Ry. Co.*, 236 U. S. 115; 59 L. Ed. 492; 35 S. Ct. 255;

Old Wayne, etc. v. *McDonough*, 204 U. S. 8; 51 L. Ed. 345; 27 S. Ct. 236;

People's etc. v. *American etc.*, 246 U. S. 79; 62 L. Ed. 587;
Alexander, etc. v. *National, etc.*, 33 Fed. Supp. 334.

Both lower courts found that all causes of action involved in this suit arose outside of Texas. While this finding is not subject to review by this Court, it is not only not clearly erroneous, but is substantially supported by the evidence (Point I(A) and (B) of this brief).

This court has many times held, in construing statutes and appointments by foreign corporations of service agents, similar to and at least as broad in its language as the statute and appointment in this suit, that, in the absence of compelling language in the statutes and appointments or local state decisions to the contrary, they do not apply to or confer jurisdiction in a suit brought against a foreign corporation after it ceases doing business in the State upon a cause of action arising outside of the State, or, conversely, upon a cause of action which does not accrue within the State at a time when it is transacting business in the State under a license from the State to do such business. The decisions were summarized and the rule was clearly stated in *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2nd) 346, (*supra*), wherein it was said:

> *"However, in the absence of compelling language in the state law, or local state decision to the contrary, such appointments will be construed by the United States Supreme Court to exclude causes of action arising outside the state for which the appointment was given. Morris & Co.* v. *Scandinavia Ins. Co., supra; Robert Mitchell Furniture Co.* v. *Selden Brack Construction Co.*, 257

U. S. 213, 42 S. Ct. 84; 66 L. Ed. 201; *Missouri Pacific Railroad Co.* v. *Clarendon Boat Car Co. Inc.*, 257 U. S. 533, 42 S. Ct. 210, 66 L. Ed. 354. In those cases, however, where the appointments and statutes do extend to causes of action arising outside of the state where the appointment was given, they are not effective as to causes of action arising outside of the state unless the defendant corporation is actually doing business in that state at the time of the service upon such agent. *Chipman, Ltd.* v. *Jeffrey Company*, 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314." (Italics ours.)

There is no decision of any court in Texas, Federal or State, nor is there anything in the language of the Texas Statute or the appointment involved in this suit, which would justify a construction contrary to that given by the Court in the case just cited.

Petitioner states on page 11 of his brief that the courts of Texas have not as yet construed the Texas Statute. The District Court stated that the statute has not been construed by any state court of Texas (R. 285). We know of at least two cases, however, in which the statute was construed by Federal Courts sitting in Texas: *Moore* v. *National, etc.*, 21 Fed. Supp. 177 (*supra*), and *Ambrose Johnson* v. *Richman & Samuels, Inc.* (*supra*). In *Moore* v. *National etc.*, it was held that neither the Texas statute nor the appointment thereunder by defendant, a foreign corporation, of a service agent in Texas applied to a cause of action accruing outside of Texas even though, unlike the situation in the instant case, the defendant was actually present and doing business under a permit to do business in Texas at the time it was sued, and the defendant's appointment of a service agent was unrevoked and in full force and effect. In the *Ambrose Johnson* case the party defendant and the jurisdic-

tional facts, including the appointment by the defendant of a service agent in Texas, were identical with those in this suit, except that the plaintiff in the former suit sued only to recover liabilities to him of the partnership of Richman and Samuels alleged to have been assumed by the corporate defendant. The court construed the statute and appointment as not applying to a cause of action arising outside of Texas; hence, it quashed the service of process and dismissed the suit for lack of jurisdiction upon finding that there was no evidence that the defendant agreed to assume or to pay in Texas the partnership liabilities.

There is no compelling language in the statute or the appointment to justify their being applied to a cause of action arising outside of Texas. The Texas Statute refers to a foreign corporation "seeking a permit to do business in this State", and as a "prerequisite to its right to secure a permit to do business in Texas", and throughout repeatedly refers to a foreign corporation's "doing business in Texas", and it is only in consideration of the privilege of "doing business in Texas" that a foreign corporation is required to appoint a resident citizen of Texas as its agent for service of process in any suit brought against it in that State. The appointment authorized respondent's service agent to receive service of process on its behalf "subject to and in accordance with all the provisions of the laws of the State of Texas". It is a reasonable conclusion, therefore, that the statute and the appointment apply only to suits which are based upon causes of action arising in Texas, and that, when respondent in consideration of the privilege of securing a permit to do business in Texas appointed a service agent therein, it agreed to be sued in Texas only with respect to causes of action accruing in Texas.

Application of the decisions in such cases as *Chipman* v. *Jeffrey*, 251 U. S. 373 (*supra*), *Hunter* v. *Mutual, etc.*, 218 U. S. 573 (*supra*), *Mitchell, etc.*, v. *Selden, etc.*, 257 U. S. 213 (*supra*), *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2nd) 346 (*supra*) and *Johnson* v. *Richman & Samuels, Inc.* (*supra*), to the facts involved in this suit must necessarily result in its dismissal for lack of jurisdiction over the person of the respondent. In each of those cases the statute and the appointment by the defendant foreign corporation was similar to and at least as broad in its language as the statute and the appointment in this suit; yet in each case the court construed the statute and the appointment as not applying to a suit against a foreign corporation after it ceased doing business in the State upon a cause of action arising outside of the State, and it dismissed the suit for lack of jurisdiction over defendant's person upon finding that the suit was of such a nature. A comparison of the critical language contained in the statutes and appointments involved in those cases with the language "*all suits * * * and causes of action*" in the Texas Statute and "*all process of law * * * in any legal action*" in the appointment in this suit will show their essential similarity.

In *Chipman* v. *Jeffrey*, the New York statute provided that a foreign corporation as a prerequisite to obtaining a permit to do business in New York must designate "a person upon whom *process* against such corporation may be served within the state". The designation of a service agent in New York by the defendant, a foreign corporation, stated "* * * the name of the person residing in the State of New York upon whom *process* against the said corporation may be served within the state * * *". In *Hunter* v. *Mutual* the statute provided for the appointment by a foreign

insurance corporation seeking to do business in North Carolina of the Insurance Commissioner "as its agent upon whom *all lawful process in any legal action or proceeding* might be served". In *Morris & Co.* v. *Scandinavia Ins. Co.*, the Illinois Statute provided that a "foreign corporation desiring to transact any such business * * * in this State shall appoint an attorney in this State on whom *process of law* can be served".

The following excerpt from the opinion in *Hunter* v. *Mutual* is illuminating:

> "The next contention is that, even if defendant did withdraw from the state in good faith, the authority to the Insurance Commissioner to receive service of process continues as long as the company had outstanding liabilities in the State. And this, it is insisted, constituted the duration of the authority not only for causes of action arising in the State, but for causes of action arising in other States."

The court in refusing to lend its support to this contention said:

> "The policies upon which the four judgments were recovered were not issued in North Carolina, and not having been issued under the faith of its laws are not entitled to their remedial sanction."

The cases just discussed by us bear added significance to the suit at bar because (1) under the laws of the States involved in those cases suit may be brought against a foreign corporation upon a cause of action arising outside of the State if the corporation is present and doing business in the State

when sued, whereas there is no law, statutory or judicial, in Texas which authorizes a suit against a foreign corporation upon a cause of action arising outside of Texas even though the corporation may be doing business in the State when sued, and because (2) in each of those cases, with the exception of *Hunter* v. *Mutual,* the appointment by the corporate defendant of a service agent and its permit to do business in the State were in full force and effect at the time suit against it was brought, whereas in the instant suit, the respondent had revoked the appointment of its service agent in Texas and cancelled its permit to do business in Texas before this suit was brought and service upon said agent attempted.

POINT III.

No jurisdiction was acquired over respondent's person since neither the Texas Statute nor the appointment by respondent of a service agent applies to a suit, such as this, brought against respondent after it had ceased doing business in Texas upon causes of action which accrued before the enactment of the statute and before respondent obtained a permit to do business and appointed a service agent in Texas.

The Authorities.

The authorities listed under Point II;

The Texas Constitution, Article I, Section 16;
Union Pacific R. R. Co. v. *Laramie Stockyard,* 231 U. S. 190;
Hartley v. *Utah, etc.,* 106 Fed. (2nd) 953;
Vandenbark v. *Owens, etc.,* 110 Fed. (2nd) 310;
U. S. v. *McKinney,* 107 Fed. (2nd) 879;

Morrison v. *B. & O. R. R. Co.,* 117 App. Div. 613 (N. Y.);
Fairclough v. *Southern Pacific Co.,* 171 App. Div. 476, affd. 219 N. Y. 657 (114 N. E. 1066);
45 *American Law Reports* 1447 at 1454.

The District Court found that, with the possible exception of one item involving $62.78, all of the causes of action accrued before the enactment of the Texas Statute and before the respondent obtained a permit to do business in Texas and appointed a service agent therein (R. 289-90). This finding is not subject to review by this Court (Point I (A) of this Brief); in any event, it is not only not clearly erroneous but it has substantial support in the evidence (Point I (B) of this Brief).

Neither the statute nor the appointment should be construed by this court as applying to causes of action which accrued prior to the passage of the statute or the execution of the appointment or before respondent obtained a permit to do business in Texas because such construction (1) would give the statute a retroactive effect contrary to the Texas Constitution, Article I, Section 16 and well established rules of statutory construction, and (2) would be contrary to the principle, as established by the cases, that a foreign corporation may by ceasing to do business in a state prevent suit from being brought against it in that state with respect to transactions which occurred before the corporation obtained a permit to do business in the state and appointed a service agent therein.

(1) Prior to the effective date of the Texas Statute on September 1st, 1933 a foreign corporation was not

subject to the jurisdiction of the Courts of Texas after it ceased doing business therein. (See Section 7 of the Statute.) Ever since that time, however, the statute has permitted suit to be brought in Texas against a foreign corporation not only so long as it is authorized to do business in the State but for a period of four years after it should cease doing business therein. To construe the statute as subjecting respondent to a suit in Texas after it ceased doing business and cancelled its permit to do business in Texas, founded upon a transaction which occurred before the statute was enacted, would be to give it a retroactive effect by depriving the respondent of the right it had before the passage of the statute to cease doing business in Texas without being amenable thereafter to suit in that state. Such a construction would violate the Texas Constitution, Article I, Section 16 which provides:

> "No bill of attainder, ex-post facto law, *retroactive law*, or any law impairing the obligation of contracts shall be made." (Italics ours.)

Such a construction also would be contrary to the fundamental and well established rule of statutory construction that a statute is presumed to operate prospectively, not retroactively, and will be given a retroactive construction only if, to quote from the opinion in *Union Pacific R. R. Co.* v. *Laramie Stockyard*, 231 U. S. 190 at 199 (*supra*), "such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature," and such construction does not impair some constitutional guarantee, Federal or State.

Certainly, the statute does not by "the unequivocal and inflexible import of the terms" thereof operate

retroactively. On the contrary, the language of the statute indicates quite conclusively that it is intended to effect only such business as a foreign corporation may transact in Texas after the passage of the statute. Expressions of futurity such as "shall" appear throughout the statute; Section I of the Statute states: "From and after the effective date of this Act * * * every foreign corporation * * * shall * * *", and Section 5 (a) provides that if a foreign corporation shall fail to designate a service agent as required by the statute "Each of its Acts in this State shall * * * be void; and it shall be incapable * * * of * * * enjoying any right, power, privilege or immunity *that shall not have already accrued* * * *." (Italics ours.)

The decision in *Hartley* v. *Utah, etc.*, 106 Fed. (2d) 953 (*supra*), is applicable to the present suit. In that case the defendant, a Utah corporation, was involved in an automobile accident in Oregon. Subsequent to the accident a law was enacted in Ohio which provided that if a non-resident autoist used the highways of Ohio, he would be deemed to have appointed the Secretary of the State of Ohio as his lawful agent upon whom process could be served in any suit in Ohio against him arising out of an accident in which he was involved when using his automobile in Oregon. Pursuant to this statute, the plaintiff instituted suit against defendant in Ohio by serving process upon the Secretary of State of Ohio. The Court held that there was nothing in the language of the statute to justify applying it to accidents occurring before the enactment of the statute, and it, therefore, dismissed the suit for lack of jurisdiction over the defendant's person.

(2) In every case known to us, and in every case cited by the petitioner, where jurisdiction was sustained in a suit against a foreign corporation after it had ceased doing business in the State where sued, the suit was founded upon a transaction by the corporation in the State *after* it had obtained a permit to do business in the State and had appointed a service agent therein. Such is not the situation in this suit since the transactions upon which it is based accrued *before* the enactment of the Statute and *before* respondent obtained a permit to do business in Texas and appointed a service agent therein.

The rule established by those cases is clearly stated in 45 A. L. R. 1447 at 1454:

> "The rule that the authority of the designated agent of a foreign corporation to receive service of process survives the withdrawal of the corporation from the State operates only in favor of those for whose benefit the statutes were made, viz., persons dealing with the corporation during the time when, by virtue of its designation of an agent, it was authorized to do business in the State."

This rule has been emphasized in many of the cases and authorities relied upon by the petitioner, particularly those on pages 40-47 of his brief. Thus, in 12 R. C. L. Sec. 89, page 113, cited by petitioner on pages 40-41 of his brief, it is stated that a foreign corporation cannot by ceasing to do business in the State from which it obtained a permit to do business escape from the jurisdiction of the courts of that State in an action brought by a resident thereof with whom it has contracted "*under* its permission to do business therein". (Italics ours.) And to mention

just one other case, we would direct this Court's attention to *Meixell* v. *American Motor Sales Co.*, 103 N. E. 1071, appearing on pages 41 and 42 of petitioner's brief, in which the court held that a foreign corporation is subject to suit in a State where it had obtained a permit to do business even after it had cancelled such permit and ceased doing business therein, but only "where the cause of action arises out of a contract made in this State with the corporation *while it was engaged in the exercise of its franchises and the transaction of business in this State under its agreement with the State* * * *." (Italics ours.)

Certainly, then, petitioner is not one in whose favor the rule operates, since the transactions upon which he bases his suit did not occur, to use the language in 47 A. L. R. 1447 at 1554 (*supra*), "during the time when by virtue of its (respondent's) designation of an agent it (respondent) was authorized to do business in the State (Texas)". (Parenthesis ours.)

POINT IV.

Neither the Texas statute nor the appointment by respondent of a service agent applies to transactions in Interstate Commerce, and since the transactions in this suit were in Interstate Commerce, no jurisdiction was acquired over respondent's person.

The Authorities.

The authorities listed under Point II and the authorities cited in the body of this point.

Neither one of the lower courts made any finding as to whether or not the transactions in this suit were

interstate commerce. Certainly, however, all transactions subsequent to June 1927 were in interstate commerce since they involved shipments of produce from points in Texas on consignment to respondent in New York City where they were sold by respondent on a commission basis for the accounts of various companies in Texas to whose rights and interests petitioner claims to have succeeded (R. 72, 74-5, 325, 329-30).

Furst & Thomas v. *Brewster, et al.*, 282 U. S. 493;
Ozark Pipeline Corp. v. *Monier*, 266 U. S. 555;
Currin v. *Wallace*, 306 U. S. 1;
Butler Bros. v. *U. S. Rubber Co.*, 156 Fed. 1 (cert. denied 212 U. S. 577);
Lasater v. *Purcell Mill*, 22 Tex. Civ. App. 33.
Dickson Publishing Co. v. *Bryan*, 5 S. W. (2d) 980 (Texas);
Allen v. *Tyson-Jones Buggy Co.*, 91 Tex. 22.

It has been repeatedly held by this court and the courts of other jurisdictions that a state may not require a foreign corporation to obtain a permit to do business in the state or appoint an agent for service of process therein if such business relates to interstate commerce. As this court said in *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197:

> "A requirement that a foreign corporation appoint a resident agent on whom process may be served in an action against it, as a condition precedent to suing in the courts of the state to collect a claim arising out of interstate commerce transactions, is a burden on interstate commerce because it necessarily operates to thwart the pur-

pose of the Constitution to secure and maintain the freedom of such commerce by whomsoever conducted."

See also:

Furst & Thomas v. *Brewster, et al.*, 282 U. S. 493 (*supra*);
Butler Bros. v. *U. S. Rubber Co.*, 156 Fed. 1 (Certiorari denied 212 U. S. 577) (*supra*);
Continental Supply Co. v. *Hoffman*, 135 Tex. 552; 144 S. W. (2d) 253;
Dickson Publishing Co. v. *Bryan*, 5 S. W. (2d) 980 (Tex.) (*supra*);
Allen v. *Tyson-Jones Buggy Co.*, 91 Tex. 22 (*supra*).

Nor did the appointment by respondent of a service agent operate as a consent to be sued with respect to interstate transactions, despite the broad language of the appointment that said agent had authority to receive on behalf of the respondent "all process of law * * * in any action" against it. As this court said in *Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555 (*supra*):

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of Eminent Domain. These facts could not have the effect of conferring upon the state an authority denied by the Federal Constitution to regulate interstate commerce."

The scope of a statute in Pennsylvania and the designation thereunder by a foreign corporation of a service agent in that state, similar in character to the statute and appointment in this suit, was defined in *Kraus* v. *American Tobacco Co.*, 283 Pa. 146; 129

Atl. 60. In that case the statute provided in language as broad as that in the statute in this suit that a foreign corporation doing business in Pennsylvania must appoint "the Secretary of the Commonwealth as its agent upon whom *all process* may be served, and the authority of such agent shall continue in force so long as any liability remains outstanding against it in the Commonwealth." (Italics ours.) The court said:

> "The plain meaning of this statute is that when a foreign corporation registers hereunder and appoints the Secretary of the Commonwealth as agent on whom legal service may be made, such appointment continues in full force and effect until the corporation bona fide withdraws from the state and ceases to do business thereunder; for so long as it continues to *do business of an intrastate nature,* in Pennsylvania, after having registered, it is liable to be sued here; and *that is the liability referred to in the Act* * * * When a foreign corporation applies for registration, it in effect says to the Commonwealth, 'Let me register and freely sue in your courts, and I will agree that while I continue to do an *intrastate business,* in Pennsylvania whosoever occupies the office of the Secretary of the Commonwealth may be served as my agent.'" (Italics ours.)

While we know of no case in which the particular section of the statute under discussion (Section 1) has been construed with respect to interstate commerce, Section 5(b) of the statute has been so construed. This section provides:

> "Such corporation shall be incapacitated to maintain *any* suit or legal proceeding in any court in this state upon *any* demand; whether arising out of contract or tort." (Italics ours.)

The expressions "any suit" and "any demand" are no more limited than is "all suits * * * and causes of action" in Section 1 of the statute. Yet the courts of Texas have construed Section 5(b) as not applying to suits or demands related to transactions in interstate commerce. In *Continental Supply Co.* v. *Hoffman,* 135 Tex. 552; 144 S. W. (2d) 253 (*supra*), the court said:

> "It is well settled by the decisions of this court that the provisions of Article 1536 (Sec. 5 of the Texas Statute) have reference exclusively to demands which arise out of intrastate transactions. They do not apply to demands which arise out of interstate transactions—that is to say, transactions which involve interstate commerce. *Miller* v. *Goodman* , 91 Tex. 41, 40 S. W. 718; 11 Tex. Jur. p. 162. In a word, as regards interstate transactions no permit to transact business is required." (Italics ours.)

POINT V.

The revocation by the respondent of its appointment of a service agent in Texas was effective to defeat service upon him in this suit, although no jurisdiction would have been acquired even if the appointment had not been revoked.

The Authorities.

Chipman v. *Jeffrey,* 251 U. S. 373 (*supra*);
Mitchell, etc. v. *Selden,* 257 U. S. 213 (*supra*);
Morris & Co. v. *Scandinavia, etc.,* 279 U. S. 405 (*supra*);
Morris & Co. v. *Scandinavia, etc.,* 81 Fed. (2) 346 (*supra*);

Ambrose John v. *Richman & Samuels, Inc.* (U. S. District Court, Texas, see Appendix, pp. i to iv) (*infra*).

It is not disputed that prior to the commencement of this suit respondent revoked the appointment of the service agent upon whom the citation in this suit was served (R. 126-7). Service upon him, therefore, was a nullity and ineffective to bring respondent within the jurisdiction of the court in which this suit was filed.

However, under the authorities and the decisions of this Court no jurisdiction would have been acquired over respondent's person even if the appointment had not been revoked because the respondent was not doing business in Texas at the time this suit was brought and service was made and the causes of action arose outside of Texas. The test of jurisdiction as established by the authorities, where the suit is founded upon a cause arising outside of the state in which the suit is brought, is not whether the appointment of the service agent by the corporation is in effect and unrevoked at the time of service upon him, but whether the corporation is doing business in the state at the time of such service. If the corporation is not doing business in the state at the time of service, jurisdiction cannot be obtained even though the appointment of its service agent is in full force and effect at the time of service upon him (See the cases cited under the caption, *The Authorities,* of this point). Compare the statutory provisions relating to the duration of the authority of the service agent appointed by the foreign corporation in those cases with that involved in this suit and which provides that such authority shall continue "so long as said corporation

is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or ceased to do business in Texas." In *Chipman* v. *Jeffrey* the New York Statute provided that the authority of the service agent "shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state."; in *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2d) 346, the Illinois Statute provided that "the agent last designated or acting for such corporation shall be deemed to continue agent for such corporation for the purpose of serving process * * *"; in *Morris & Co.* v. *Scandinavia, etc.*, 279 U. S. 405, the Mississippi Statute provided that the authority of the service agent "shall continue in force irrevocable so long as any liability of the company remains outstanding in this state"; and in *Mitchell* v. *Selden, etc.*, the Ohio Statute provided that the foreign corporation shall file "an irrevocable consent of such corporation to service of process upon such agent so long as the authority of such agent shall continue * * *"

POINT VI.

Answering Petitioner's Arguments.

At the outset we should state that none of the cases or authorities cited by the petitioner defeats any of respondent's contentions or supports the construction of the statute and appointment urged by him. In every case cited by petitioner, and in every case known to us, where jurisdiction *in personam* over a foreign corporation was sustained either (1) the cause

of action accrued in the state where suit was brought and out of business transacted by the corporation in the state under a permit from the state to transact such business, or (2) the corporation was present and doing business in the state under a permit to do such business at the time suit against it was brought. Neither of such situations exists in this suit since, as we have previously shown, (1) the causes of action asserted by petitioner did not arise in Texas, nor did they grow out of business transacted by the respondent in Texas under its permit to do business in Texas, and (2) the respondent was not present and doing business in Texas at the time this suit was brought, or at any time since, and prior to such time it had cancelled its permit to do business in and had ceased doing business in Texas, and had revoked the appointment of its service agent prior to the time service of process in this suit was made upon him.

Answering Petitioner's Point II.

Petitioner contends that neither the statute nor the appointment is limited in its application to causes of action arising in Texas, or out of business done by respondent in Texas, and that respondent, by voluntarily complying with the statute and appointing a service agent in Texas, submitted itself to the jurisdiction of the Courts of Texas in any suit that might be brought against it so long as it was doing business in Texas and for four years after it should cease doing such business, regardless of where the cause of action might arise. He bases his contention upon the broad language of the statute "all suits, proceedings, and causes of action", and of the appointment, "all process of law * * * in any legal action or proceeding", which language, he argues, contains no

limitation or restriction upon the situs of the cause of action upon which suit against a foreign corporation may be brought in Texas.

The construction urged by petitioner has no juridical support, and, as we have shown under the second, third, and fourth points of this brief, is contrary to the authorities and the decisions of this court, by virtue of which the statute and the appointment must be construed as applying only to causes of action accruing in Texas after the statute went into effect and after respondent obtained a permit to do business in Texas and appointed a service agent therein. The flaw in petitioner's reasoning is that it not only fails to take into consideration the purpose of the statute and the appointment, but it also completely removes the above quoted language from their places in the contexts of the statute and the appointment which, by their repeated references to the doing of business in Texas by a foreign corporation, must be deemed to qualify and limit "all causes of action" and "any legal action" to "any" and "all" causes of action accruing in Texas. Certainly, there can be no more justification for construing the statute and the appointment as applying to a cause of action arising outside of Texas than there can be for giving such a construction to Section 5 (b) of the statute which, though containing language equally as broad, has been interpreted by the Texas Courts as applying only to causes of action arising in Texas (this Brief, pp. 29, 30).

Neibro Co. v. *Bethlehem Ship Building Corp., Ltd.*, 308 U. S. 165, cited by petitioner in support of the construction urged by him, is not even remotely in point. In that case the defendant foreign corporation, unlike the respondent in this suit, was doing business in, had its chief executive offices in, had a

permit to do business in, and had a service agent in the state and district in which suit was brought against it at the time such suit was brought and service had. There was no question in that suit as to where the cause of action arose; the only question was whether the defendant by its appointment of a service agent in the state had waived the provisions of Sec. 51 of the Judicial Code, 28 U. S. C. A. 112, and, therefore, its right to have the suit brought in the district of either its residence or the residence of the plaintiff. There is no question of venue involved in the present suit because, before there can be such a question, there must be potential jurisdiction, and, as we have previously shown, no jurisdiction was acquired in this suit.

Petitioner submits excerpts from several general propositions of law as stated in the Restatement of the Law of Conflict of Laws. However, these excerpts are not only misleading because the propositions from which they are taken are not given in their entirety, but they are meaningless because they do not assume the identical facts involved in this suit. In any event, if petitioner gathers strength from such general propositions, we may likewise. For instance, on page 28 of his brief, petitioner quotes the following language from Sec. 91, Sub. C, of the Restatement of the Law of Conflict of Laws:

> "The authority may be interpreted to extend to all causes of action, no matter where arising, brought against the corporation in the State, *or it may be limited to causes of action arising within the State;* it may be revocable at any time, *or it may be irrevocable as to causes of action arising within the State prior to an attempt to revoke it.*" (Italics ours.)

We have shown under Point II of this brief that the authority of respondent's service agent must be interpreted as being limited to causes of action arising in Texas.

Answering Petitioner's Point III.

Petitioner's contention that the evidence is undisputed that his contracts with respondent were made in Texas, that he performed his services under those contracts in Texas, that respondent's agents solicited his business in Texas, and that, therefore, his causes of action arose in Texas, is contrary to the findings of the lower courts both with respect to the petitioner's conclusion that the causes of action arose in Texas and the facts upon which he bases his conclusion (R. 282-4, 289, 402-4). While, as we have shown under Point I of this brief, neither the evidence nor the findings of the lower courts may be reviewed by this court, such findings are not only not clearly erroneous but they have substantial support in the evidence.

Petitioner claims that the findings of the lower courts that the causes of action arose outside of New York were based only upon a consideration of where respondent agreed to pay him for his services, not upon a consideration of where the contracts were made, where he performed his services, and where respondent solicited his business. The opinions of both lower courts show otherwise. Petitioner contends that, in any event, there is sufficient evidence in the record that he was to be paid for his services and for his produce in Texas. As we have shown on pages 7 to 9 of this brief, there is not only no such evidence, but that wherever there is any evidence with respect to these matters it shows that respondent

agreed to make and did make payments and accountings to the petitioner at its New York offices.

Petitioner claims that the contracts were made in Texas and that, therefore, at least a part of the cause of action asserted by him accrued in Texas. He relies upon Article 1995, Sub. 27, of the Revised Civil Statutes of Texas and two cases, *Stanolind, etc.,* v. *Christian* and *Hoffer, etc.,* v. *Brian,* decided by State Courts in Texas, construing said statute, in support of his contention that respondent was subject to suit in any county of Texas where the cause of action or a part thereof accrued. These authorities are not in point for two reasons: (1) The statute is expressly limited by its terms to a foreign corporation "doing business within this State (Texas)" and in each of the two cases the defendant corporation, unlike respondent in the suit, was doing business in the state and had a service agent therein when sued, and (2) as stated above, there is a total absence of evidence that the contracts were made in Texas or that any part of any cause of action arose in Texas.

Answering Petitioner's Point IV.

Petitioner contends that the Texas Statute applies to causes of action arising out of business conducted by a foreign corporation in Texas while it is engaged in business therein, and is not limited to causes of action arising within that state; and that since, as he claims, the causes of action here involved are of the former kind, the Statute applies to this suit.

The cases of *Louisville, etc.,* v. *Chatters, etc.,* 49 S. Ct. 329, and *Wefel* v. *W. P. Brown, etc.,* 58 Fed. (2d) 667, relied upon by petitioner in support of the

construction urged by him are not in point; and there is no evidence to support the facts assumed by him. As regards the evidence, petitioner asserts that "an examination of the record in this case will lead this court to the inescapable conclusion that petitioner's cause of action relates to and grew out of business relations had with respondent in Texas while it was engaged in business in Texas". It is significant, however, that in making this reference to the record he has failed to comply with the Rules of this court in not stating on what pages of the record the relevant evidence may be found. In any event, there is a total absence of evidence that respondent was engaged in business of any kind in Texas between the time when petitioner's employment with respondent was terminated in June 1927 and August 13, 1934, when respondent obtained a permit to do business in Texas (R. 158, 189-90, 113); and the only transactions involved in this suit subsequent to June 1927 were connected with shipments in interstate commerce on consignment to respondent at its place of business in New York, and any and all business engaged in by respondent with respect to these transactions took place at its New York offices (This Brief, p. 9). Certainly, such transactions did not give rise to causes of action arising out of business conducted by respondent in Texas.

As to the two cases relied upon by petitioner, they are not applicable to this suit because in each one of them the defendant foreign corporation, unlike the respondent in this suit, was doing business in, had a permit to do business in, and had a service agent in the state at the time suit against it was brought and service upon such agent had. Furthermore, in the *Louisville* case the statute involved expressly pro-

vided that the authoriy of the service agent appointed by a foreign corporation was limited to a liability "growing out of or connected with the business done by said corporation in this state", whereas the Texas Statute contains no such limiting language; and in the *Wefel* case the only question involved was one of venue, whether the service agent appointed by the corporation was properly served in a district of the state other than that in which suit was filed, whereas no such question is involved in the present suit because respondent was not subject to suit in any district of Texas.

The Perishable Agricultural Commodities Act, 7 U. S. C. A., Sec. 499 (b), and *Iwata* v. *Western Fruit Growers,* 90 Fed. (2d) 575, do not support petitioner's contention that by virtue thereof respondent was required to render accountings and make payments to the petitioner in Texas with respect to the consignment shipments involved in this suit. First, that Act became law in June, 1930, and, therefore, does not apply to transactions prior to that date; and, second, that Act and case hold only that a consignee subject to the Act must account promptly with respect to consignments, but there is nothing in the Act nor in the case which states where the accounting must be made.

Answering Petitioner's Point V.

An answer is hardly required to petitioner's contention that unless respondent is subjected to the jurisdiction of the Courts of Texas he will be relegated to the courts of New York where he will be unable to obtain relief because his causes of action are barred by the Statute of Limitations of that State. Obviously, the question of jurisdiction now before this court is in no manner dependent upon whether or not the

petitioner may obtain relief in New York or in any other state in the event that the Texas courts have no jurisdiction. It is our belief that the causes of action are also barred by lapse of time under Texas law, but certainly any arguments that we might advance in support of this belief would be entitled to no more consideration by this Court in deciding whether jurisdiction exists in this suit than are the arguments advanced by petitioner that his causes of action are barred under New York law but not under Texas law. Whether petitioner's suit is barred under New York law but not under Texas law because of lapse of time was not an issue in the lower courts and is not an issue in this Court.

Answering Petitioner's Point VI.

Petitioner contends that the revocation by respondent of the appointment of its service agent prior to service upon him in this suit was ineffective to defeat such service because (1) respondent did not file such revocation in the Office of the Secretary of State of Texas and did not appoint another service agent in his place and stead, and (2) respondent could not escape from the jurisdiction of the courts of Texas as to an action brought by "a citizen of Texas, or one arising out of the contract made while the corporation is engaged in business in Texas". Neither the evidence nor the law supports petitioner's proposition.

(1) There is no requirement in the Statute, express or implied, that the revocation by a foreign corporation of the appointment of its service agent must be filed in the office of the Secretary of State

of Texas or in any other place; and while Section 3 of the Statute provides that in the event of such revocation, the corporation shall substitute the name of some other service agent, there is nothing in the Statute which would continue the authority of the service agent, whose appointment was revoked, by reason of its failure to appoint another service agent in his place and stead. In any event, as we have shown under Point V of this brief, no jurisdiction would have been acquired in this suit even if respondent had not revoked the appointment of its service agent.

(2) As for petitioner's contention that the authority of respondent's service agent was irrevocable as to an action "arising out of the contract made while the corporation is engaged in business in Texas": There are many contracts declared upon in this suit, not one (This brief, pp. 7 to 9), and, as we have shown in our answer to petitioner's 3rd and 4th points, the contracts were made in New York, not in Texas, and none of the causes of action arose out of business conducted by respondent in Texas while it was doing business there. None of the many cases cited by petitioner in support of his proposition is applicable to this suit because in each such case the cause of action accrued *within the state* and *after* the defendant foreign corporation had obtained a permit to do business in and had appointed a service agent in the state. Rather, do these cases support our contention that the Texas Statute and the appointment by respondent of a service agent applies only to causes of action arising in Texas, not to causes of action, such as are involved in this suit, arising outside of Texas. Thus, to mention but one of the cases cited by petitioner, we would refer this court to the following

language in the opinion in *Kelly* v. *Johnson Nut Co.*, 38 Fed. (2d) 177, appearing on page 45 of petitioner's brief:

> "Or, more properly, we think, the designation of an agent to receive service of process, as a condition precedent to doing business within the State, is regarded as a contract for the benefit of resident creditors, to submit to jurisdiction, *which applies to all liabilities created within the State and which, as to such liabilities, is irrevocable.*" (Italics ours.)

POINT VII.

Petitioner has given no reason why this Court should grant his petition for a writ of certiorari.

Of the many reasons relied upon by petitioner for the allowance of a writ of certiorari, only his third, fourth, seventh and tenth reasons attempt to meet the requirements established by Rule 38(5) of the Rules of this Court. His ninth reason, that the decision of the Circuit Court of Appeals in this suit is "probably in conflict with what *will be* the local decisions on that question of the courts of Texas * * *" obviously does not meet any of the said requirements in that petitioner does not claim that the decision of the Circuit Court of Appeals *is* in conflict with applicable local decisions. In any event, as we have shown under Point II of this brief, the decision of the Circuit Court of Appeals is in harmony with the decisions of at least two Federal District Courts sitting in Texas, although, there does not seem to be any decision of a Texas State Court construing the statute and the appointment involved in this suit.

Petitioner's 3rd, 4th, 7th and 10th reasons are that the decision of the Circuit Court of Appeals is in con-

flict with the decisions of this Court in *Louisville, etc.* v. *Chalters, etc.*, 49 S. Ct. 329, and *Neibro Co.* v. *Bethlehem, etc.*, 60 S. Ct. 153, and the decisions of Texas State Courts in the cases of *Hoffer Oil Corp.* v. *Brian*, 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian*, 64 S. W. (2d) 363.

The conflicts claimed do not exist. Neither the facts nor the principles of law involved in those cases are similar in nature to those in this suit; the chief distinguishing factor in those cases being that in each case the defendant foreign corporation was actually doing business in the state under a permit to do such business and the authority of its service agent was in full force and effect at the time suit against it was brought and service upon said agent had, whereas at the time this suit was brought respondent was not doing business of any kind in Texas, had no permit to do such business, and had no service agent upon whom service could be validly made. We have shown this on pages 38 to 39 of this brief with respect to the *Louisville* case, on pages 34 to 35 with respect to the *Neibro* case, and on page 37 with respect to the *Hoffer* and *Stanolind* cases.

CONCLUSION.

Petitioner has given no reason why this court should exercise its discretionary powers of review and, therefore, his petition for a writ of certiorari should be denied.

Respectfully submitted,

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SANFORD SOLARZ,
Of Counsel.

Appendix.

NOTE: (We print here only such parts of the opinion in the following case as we believe help explain the facts and law involved.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION.

Equity No. 50.

AMBROSE JOHNSON,
Plaintiff,

—against—

RICHMAN & SAMUELS, INC.,
Defendant.

October 12, 1938.

Memorandum:

This suit was filed in the State Court (District Court of Webb County) May 27, 1938, by Ambrose Johnson, a citizen of Texas, against Richman & Samuels, Inc., a corporation domiciled in and a citizen of the State of New York. The amount in controversy, exclusive of interest and costs, is more than $3000, i. e., $6103.44.

On May 27, 1938, citation was issued out of the State Court, directed to the proper officer of Bexar County, commanding him "to summon Richman & Samuels, Inc., by serving Travis B. Moursund, its agent" etc. The return of the Bexar County Officer shows that he served

such process, together with copy of Plaintiff's Petition, in San Antonio on June 7, 1938, at 9:30 A. M. by delivering to Travis Moursund, whom he describes as Defendant's Agent, a copy thereof. Defendant duly removed the case into this Court, and Transcript was filed here July 11, 1938.

On July 14, 1938, Defendant filed its so-called Plea in Abatement, or Motion to Dismiss, seeking to dismiss this case for want of jurisdiction, the claim being that neither the State Court nor this Court has acquired jurisdiction of Defendant. This is a hearing on such Plea or Motion to Dismiss.

2:—According to Plaintiff's Petition, he, during the year 1924, shipped to Richman & Samuels, of the State of New York, a partnership consisting of Louis Richman, Irving Richman, and Meyer Samuels (also of the State of New York), as agent, factor, commission merchant, broker, etc., numerous carload lots or part carload lots of farm products or perishable agricultural commodities. That because of the fraudulent accounts of such partnership and its members, such partnership became and still is indebted to Plaintiff in the sum of $6103.44, with interest thereon from April 31, 1924. The Petition does not affirmatively show that such sum of money was and is payable in Texas.

Plaintiff alleges that Richman & Samuels, Inc. is a corporation organized under the Laws of New York.

There is nothing in Plaintiff's Petition which shows that Defendant assumed the indebtedness of the partnership of Richman & Samuels in Texas, or agreed to pay same in Texas. The inference is that if Defendant assumed such indebtedness, it was assumed and to be performed outside of the State of Texas, i. e., probably in New York State, where both the partnership and its

members and Defendant then had their residence and domicile.

Under these circumstances, it is clear that neither the State Court nor this Court by the serving of the process on Travis Moursund has acquired jurisdiction of the person of Defendant. The rule is thus stated in *Morris & Co.* v. *Skandinavia Ins. Co., Ltd.*, 81 Fed. (2d) 346:

> "However, in the absence of compelling language in the state law, or local state decision to the contrary, such appointments will be construed by the United States Supreme Court to exclude causes of action arising outside the state for which the appointment was given. *Morris & Co.* v. *Skandinavia Ins. Co., supra; Robert Mitchell Furniture Company* v. *Seldon Breck Construction Company*, 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201; *Missouri Pacific Railroad Company* v. *Clarendon Boat Oar Company, Inc.*, 257 U. S. 533, 42 S. Ct. 210, 66 L. Ed. 354."

Plaintiff's Petition shows that Plaintiff's cause of action arose outside of Texas, and the facts here show that at the time (June 7, 1938) the process was served on Moursund, Defendant had ceased doing business in Texas, and had surrendered its Permit to do so.

But Plaintiff says that the appointment of Moursund as the Texas Agent of Defendant had not been revoked on June 7, 1938, when the Process was served on Moursund, and that this is controlling. The cases are to the contrary. *Chipman* v. *Jeffery*, 251 U. S. 373, 64 L. Ed. 314, and cases which follow.

I think the citation and the service thereof should be quashed and held for naught. I do not think, however, that the case should at this time be dismissed for want of jurisdiction. It may be that Plaintiff may amend and

obtain service of process on Defendant, and he should be allowed a reasonable time in which to do so.

Let Order be prepared and presented accordingly.

T. M. KENNERLY,
Judge.

Subsequently the plaintiff filed an amended complaint with the object of removing the objections to the jurisdiction of the court pointed out in the above opinion, but the same court, with Judge V. Allred sitting, in an opinion, dated May 16, 1939, holding that the amended complaint failed to remove the objections to the jurisdiction of the court, stated:

> "Since the amended pleadings do not set up an obligation dischargeable in Texas, but, on the contrary, affirmatively show that an obligation, if any, is performable in New York State, defendant's motion to quash and to dismiss this action will be granted."